TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 43

WILLIAM GRAU, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 21, 1932

CERTIORARI GRANTED MAY 23, 1932

(36,702)

(36,702)

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IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

No. 8466, Crim.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM GRAU, Defendant

ORDER FILING INDICTMENT—October 19, 1931

Now come the Grand Jurors heretofore impaneled and sworn herein and by their foreman announce that they have found and now present the following indictment, viz.:

No. 8466

UNITED STATES

vs.

WILLIAM GRAU

A true bill.

John R. Downing, Foreman Grand Jury. A. M. J. Cochran, Judge.

INDICTMENT—Filed Oct. 19, 1931

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF KENTUCKY, OCTOBER TERM, 1931, HELD AT COVINGTON, KENTUCKY

The grand jurors of the United States of America, impaneled, sworn and charged to inquire within and for the Eastern District of Kentucky, upon their oaths present:

That heretofore, to wit, on the 15th day of Oct., 1931, and before the finding of this indictment, in the Eastern District of Kentucky, and within the jurisdiction of this Court, one William Grau, late of said Eastern District of Kentucky, did wilfully, unlawfully and feloniously make and manufacture certain intoxicating liquors, to wit,

whisky, in an amount in excess of one gallon, and not as a casual employee only, for beverage purposes, at the premises located at No. 18 Loraine Court, Woodlawn, Newport, Campbell County, Kentucky, and other intoxicating liquors to the grand jurors unknown; the said making and manufacturing of said intoxicating liquors being then and there prohibited and unlawful;

[fol. 2] Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Second Count

The grand jurors of the United States of America, impaneled, sworn and charged to inquire within and for the Eastern District of Kentucky, upon their oaths present:

That heretofore, to wit, on the 15th day of October, 1931, and before the finding of this indictment, in the Eastern District of Kentucky, and within the jurisdiction of this Court, the said William Grau, late of said Eastern District of Kentucky, did wilfully and unlawfully possess and have in his possession certain property designed for the unlawful manufacture of intoxicating liquors, intended for use in violation of Title 27, Sec. 12-39 U. S. C. A., to wit, a still, worm, still cap, thumping keg, flake stand, piping, furnace, fermenters, process keg, mash rake, mash, pomace, still beer, low wines, malt corn, meal, at the premises located at No. 18 Loraine Court, Woodlawn, Newport Campbell County, Kentucky, and other property to the grand jurors unknown, the said possessing and having in possession of said property being then and there prohibited and unlawful;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Title 27, Sec. 12-39 U. S. C. A.

Sawyer A. Smith, United States Attorney.

[fol. 3] Indorsement on back of Indictment: No. 8466. United States District Court, Eastern District of Kentucky. The United States vs. William Grau. Indictment for Violation of Sections 12 and 39, Title 27, U. S. C. A., Unlaw-

fully Manufacturing and Possessing Property Designed for Manufacturing Intoxicating Liquors. A True Bill. Jno. R. Downing, Foreman Grand Jury, Eastern District of Kentucky. Filed Oct. 19, 1931. S. W. Stacey, Clerk U. S. District Court. Verdict. We, the jury, find the defendant guilty this 21st day of October, 1931. Edwin C. Rabe, Foreman. Witnesses: F. M. Curtis, W. K. Redman, H. B. Sandlin, J. T. Tartar.

[fol. 4] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING PETITION TO QUASH—October 20, 1931

Came the defendant, by counsel, and offered for filing Petition of the defendant, William Grau, to quash the Search Warrant and to suppress evidence and information secured through the illegal search thereunder, and the Court, being fully advised ordered that the said petition be filed, and that the same be overruled, to which ruling of the court, defendant by counsel, objects and excepts.

The defendant, by counsel, pleads that he is not guilty as charge- in the indictment herein.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

PETITION TO QUASH THE SEARCH WARRANT AND TO SUPPRESS EVIDENCE—Filed October 20, 1931

The petitioner, William Grau, says that he is the defendant herein.

He says that on the 15 day of October, 1931, a search warrant was issued by Hon. Edward W. Pflueger, United States Commissioner, at Covington, Kentucky, directed to the Internal Revenue Officer of the United States for the Eastern District of Kentucky, and to his deputies or any of them, and to F. M. Curtis or H. B. Sandlin, Federal Prohibition Agents, commanding them to search certain premises of your petitioner known as 18 Lorraine Court, Woodlawn, Newport, Campbell County, Kentucky, in the Eastern Dis-

trict of Kentucky, for intoxicating liquors and property designed for the manufacture of intoxicating liquors and to seize any such liquors and property found therein, and bring them before the said Commissioner.

[fol. 5] Said search warrant is on a printed form, the only language thereon not printed being the names of F. M. Curtis and H. B. Sandlin, witnesses and federal prohibition agents, the description of the premises, the date of the warrant and the name of the said Commissioner who issued same. Said search warrant and the return made thereon as hereinafter set forth, are in words and figures as follows, to-wit:

Search Warrant

"UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

To the Internal Revenue Officer of the United States for the Eastern District of Kentucky and to his deputies, or any of them, and to F. M. Curtis or H. B. Sandlin, Federal Prohibition Agent:

Whereas, F. M. Curtis and H. S. Sandlin, has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described, as a means of committing a felony or misdemeanor against the United States; and whereas said complainant, before the issuing of this warrant, has been examined on oath by the undersigned Commissioner; and that probable cause, supported by said affidavit, has been shown that said property is being used to commit a felony or misdemeanor, to-wit: unlawful manufacture, possession and sale of intoxicating liquor (whisky & still); and whereas said affidavit names the person and particularly describes the property and place to be searched and sets forth the facts tending to establish the grounds of the application or probable cause for believing that they exist; and whereas the undersigned Commissioner is now satisfied of the existence of the grounds of the application for this warrant and that there is probable cause to believe their existence, now therefore,

You are hereby commanded forthwith to search the place hereinafter particularly described for the property specified, to wit: intoxicating liquors and property designed for the manufacture of intoxicating liquors, and to seize and bring said property and all other evidence of such felony or [fol. 6] misdemeanor before the undersigned Commissioner.

This search warrant may be served by you, but by no other person except in aid of you, you requiring his aid and being present and acting in its execution. You may break open any outer or inner door or window of a house or any part of a house or anything therein, to execute the warrant, if after notice of your authority and purpose, you are refused admittance; you may break open any outer or inner door or window of a house for the purpose of liberating a person, who, having entered to aid you in the execution of the warrant, is detained therein, or when necessary for your own liberation; this warrant may be served at any time of the day or night; and must be executed and returned to the undersigned Commissioner within ten days of its date; unless executed within ten days after this date, this warrant shall be void. Should you take the property under this warrant, you shall give a copy of the warrant, together with a receipt for the property (specifying it in detail) to the person from whom it was taken or in whose possession it was found, or in the absence of any person said copy and receipt must be left in the place where said property is found. You will forthwith return the warrant to the undersigned Commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant if they are present, verified by your affidavit at the bottom of the inventory and taken before the undersigned Commissioner.

The place or premises which you are hereby directed to search as aforesaid is described as follows:

Premises known as 18 Loraine Court, Woodlawn, Newport, Campbell County, Kentucky, and being situated in the — and State of Kentucky and within the district above named, and occupied by persons unknown.

Given under my hand and seal on this Oct. 15, 1931.

Edw. W. Pflueger, U. S. Commissioner as aforesaid.

(Seal.)

Return

The undersigned, to whom the foregoing warrant was issued and delivered for execution, certified that he this day executed said warrant by searching the premises therein named and that as a result of said search he found and seized the following property:

[fol. 7] 1 200 gal. copper still complete.
32 50 gal. fermenters.
1600 gal. Still beer.
350 gal. Moonshine whisky—200 empty gal. cans.
1 50 gal. copper tank, 100 ft. tin hose, 30 ft. 2 in. copper tubing.
2 Electric motors and 12-2 ft. gas burners.

He says that the above inventory contains a true and detailed account of all the property taken by him on said warrant.

He makes this his receipt to the person from whose possession said property was taken.

H. B. Sandlin, F. P. A.

Subscribed and sworn to before me this —— —, ——. —— ——, U. S. Commissioner, Eastern District of Kentucky."

Your petitioner says that acting in the official capacities under said search warrant, said F. M. Curtis and H. B. Sandlin, who were then and still are Federal Prohibition Agents, on said date searched said premises of your petitioner and then and there found and seized therein and carried away therefrom, certain articles which were the property of your petitioner and in his possession, and which are described in the return on said warrant made by H. B. Sandlin, Federal Prohibition Agent, as follows:

1 200 gal. copper still complete.
32 50 gal. fermenters.
1600 gal. Still beer.
350 gal. Moonshine whisky—200 empty 1 gal. cans.
1 50 gal. copper tank, 100 ft. 1 in. hose; 30 ft. 2 in. copper tubing.
2 Electric motors and 12-2 ft. gas burners.

A copy of said search warrant and of the return thereon was delivered by said officers to your petition at the time

of said search, and same is filed as a part hereof marked "A."

Said articles so seized are now in the possession of said Federal Prohibition Agents, said U. S. Commissioner, the United States Marshal and the United States Attorney for [fol. 8] the Eastern District of Kentucky, who are holding same without the consent and against the will of your petitioner; and said articles will, unless prevented by order of this Court be introduced by them in evidence against your petitioner at the trial herein, in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States and under section 25 Title 11 of the National Prohibition Act, and under the Act of Congress of June 15, 1917, 40 Stats., section 228 et seq.

Said search warrant was issued and executed illegally, for the following reasons, to-wit:

First

Said search warrant contains no statement of any particular grounds or probable cause for its issuance, and sets out no evidential matter or statement of facts contained in the affidavits referred to in the warrant, but recites merely in language that is printed, except for the names of the witnesses, that whereas F. M. Curtis and H. S. Sandlin have made oath as complainant and presented written affidavits alleging that

"intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described," etc.

Said language is merely general and refers only to a conclusion or opinion of said affiants, and recites no evidential matter or statement of fact in either of said affidavits, and states no particular grounds or probable cause for the issuance of said warrant, which for said reasons was issued and served illegally and is void under section 6 of said Act of June 15, 1917, which provides as follows:

"Sec. 6. If the judge or Commissioner is therefore satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name

of office, to a civil officer of the United States, stating the particular grounds or probable cause, for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and [fol. 9] to bring it before the judge or commissioner."

Your petitioner says that by the provisions of Section 25, Title 11, of the National Prohibition Act search warrants may issue only as provided in said Act of June 15, 1917, 40 Stats., sec. 228 et seq.

Second

The said premises of your petitioner described in said search warrant and searched thereunder as aforesaid were at the time said warrant was issued and when said search was made, and had been since long prior thereto, and still are, his private dwelling occupied as such by him and his wife and two children, and same was not at any of said times being used in part or at all for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house, or for any business purpose.

Your petitioner says that there was no evidence before said U. S. Commissioner when said search warrant was issued by him that your petitioner's said dwelling was being used for the unlawful sale of intoxicating liquors, and said warrant mentions no such evidence, and said warrant was therefore issued and executed unlawfully in violation of Section 25, Title 11, of the National Prohibition Act, which provides in part as follows:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel or boarding house."

Third

The said Commissioner when issuing said search warrant had filed with him only two affidavits as grounds for

the application therefor, and no other evidence whatever therefor. One of said affidavits was subscribed and sworn to by said F. M. Curtis and is in words and figures as follows:

[fol. 10] "Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14th, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.

F. M. Curtis, F. P. A.

Approved.

M. W. Moore, Ast. U. S. Attorney.

Sworn to before me and subscribed in my presence this October 15, 1931. Edw. W. Pflueger, United States Commissioner."

A copy of said affidavit is filed as a part hereof marked "B."

Said affidavit was not a legal basis for the issuance of said search warrant to search said dwelling, and even if sufficient cannot be considered as supporting said search warrant, for the following reasons:

a. Said affidavits states that the affiant on October 14, 1931, saw persons haul cans commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place; and that there is a still and whiskey mash on the premises.

Said language does not constitute evidence that said dwelling was being used for the unlawful sale of intoxicating liquor, and is not sufficient to authorize the issual of a warrant to search said dwelling.

b. Said allegations in said affidavit are not even recited or referred to in said search warrant as the particular grounds or probable cause for its issual, as required by section 6 of the Act of June 15, 1917, above set out; and they can therefore not be considered as grounds for the issual of said search warrant.

The second affidavit is subscribed by H. B. Sandlin and is in words and figures as follows, to-wit:

[fol. 11] Affidavit for Search Warrant

"UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Be It Remembered, That on this day, before Edw. W. Pflueger, a United States Commissioner for the Eastern District of Kentucky, came H. B. Sandlin, a Federal Prohibition Agent, who being duly sworn, deposes and says that there is probable cause to believe and he does believe that the laws of the United States, particularly the National Prohibition Act, are being violated by reason of the fact that intoxicating liquor, to-wit: whiskey & still is being unlawfully possessed, manufactured and sold, and possessed for sale on the premises situate in County of Campbell, and State of Kentucky, and within the district above named, occupied by persons unknown, to wit: Premises known as No. 18 Lorraine Court, Woodlawn, Campbell County, Kentucky. Said charge is supported by facts set forth in the affidavit (hereto attached) of F. M. Curtis, F. P. A.

Wherefore affiant applies for a Search Warrant authorizing the search of said premises for and seizure of, evidence of said violations.

H. B. Sandlin, F. P. A. (Affiant).

Sworn to before me and subscribed in my presence this Oct. 15, 1931. Edw. W. Pflueger, United States Commissioner as Aforesaid.

This cause coming on for hearing on the application for a search warrant supported by the affidavit above set forth, the undersigned commissioner thereupon being satisfied that there is probable cause to believe that the grounds set

forth in said application and affidavit exist, and that the law is being violated as charged, does hereby so find.

Edw. W. Pflueger, United States Commissioner as Aforesaid."

A copy of said affidavit is filed as a part hereof marked "C."

Said affidavit forms no basis for the issuance of said search warrant because it contains no evidential matter whatever, and no statement of facts, but only the opinion or conclusions of the affiant, and states no facts showing [fol. 12] that said dwelling was being used for the unlawful sale of intoxicating liquor.

Fourth

The name of the petitioner was not mentioned in said search warrant or in either of said affidavits.

Wherefore your petitioner prays that said search warrant be quashed; that said articles seized in the search thereunder and that all evidence and information acquired through said search be suppressed and excluded from the trial herein.

Charlton B. Thompson, Stephens L. Blakely, Attorneys for Petitioner.

The affiant, William Grau, says that he is the above mentioned petitioner and that the statements in the foregoing petition are true.

William Grau.

Subscribed and sworn to before me by the said William Grau this 20 day of October, 1931. M. C. Reinke, Notary Public, Kenton Co., Ky. My com. expired March 14, 1935. (Seal.)

EXHIBIT A TO PETITION TO QUASH—Filed October 20, 1931

Search Warrant

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

To the Internal Revenue Officer of the United States for the Eastern District of Kentucky and to his deputies, or any of them, and to F. M. Curtis or H. B. Sandlin, Federal Prohibition Agent:

Whereas F. M. Curtis and H. B. Sandlin has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described, as a means of committing a [fol. 13] felony or misdemeanor against the United States; and whereas said complainant, before the issuing of this warrant, has been examined on oath by the undersigned Commissioner, and that probable cause, supported by said affidavit, has been shown that said property is being used to commit a felony or misdemeanor, to-wit: unlawful manufacture, possession and sale of intoxicating liquor (whisky & still); and whereas said affidavit names the person and particularly describes the property and place to be searched and sets forth the facts tending to establish the grounds of the application or probable cause for believing that they exist; and whereas the undersigned Commissioner is now satisfied of the existence of the grounds of the application for this warrant and that there is probable cause to believe their existence, now therefore,

You are hereby commanded forthwith to search the place hereinafter particularly described for the property specified, to-wit: intoxicating liquors and property designed for the manufacture of intoxicating liquors, and to seize and bring said property and all other evidence of such felony or misdemeanor before the undersigned Commissioner.

This Search Warrant may be served by you, but by no other person except in aid of you, you requiring his aid

and being present and acting in its execution. You may break open any outer or inner door or window of a house or any part of a house or anything therein, to execute the warrant, if after notice of your authority and purpose, you are refused admittance; you may break open any outer or inner door or window of a house for the purpose of liberating a person, who, having entered to aid you in the execution of the warrant, is detained therein, or when necessary for your own liberation; this warrant may be served at any time of the day or night; and must be executed and returned to the undersigned Commissioner within ten days of its date; unless executed within ten days after this date, this warrant shall be void. Should you take property under this warrant, you shall give a copy of the warrant, together with a receipt for the property (specifying it in detail) to the person from whom it was taken or in whose possession it was found, or in the absence of any person said copy and receipt must be left in the place where said property is found. You will forthwith return the warrant to the undersigned Commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and [fol. 14] of the applicant for the warrant if they are present, verified by your affidavit at the bottom of the inventory and taken before the undersigned Commissioner.

The place or premises which you are hereby directed to search as aforesaid is described as follows:

Premises known as 18 Loraine Court—Woodlawn—Newport, Campbell County, Kentucky,

and being situated in the — and State of Kentucky and within the district above named, and occupied by persons unknown.

Given under my hand and seal on this Oct. 15, 1931.

Edw. W. Pflueger, U. S. Commissioner as Aforesaid.

(Seal.)

Return

The undersigned, to whom the foregoing warrant was issued and delivered for execution, certifies that he this day executed said warrant by searching the premises

therein named and that as a result of said search he found and seized the following property:

1 200 gal. copper still complete.

32 50 gal. fermenters.

1,600 gal. still beer.

350 gal. moonshine whisky, 200 empty 1 gal. cans.

1 50 gal. copper tank, 100 ft. 1 in. hose, 30 ft. 2 in. copper tubing.

2 Electric motors and 12 2 ft. gas burners.

He says that the above inventory contains a true and detailed account of all the property taken by him on said warrant.

He makes this his receipt to the person from whose possession said property was taken.

H. B. Sandlin, F. P. A.

Subscribed and sworn to before me this —— —, ——. —— ——, U. S. Commissioner, Eastern District of Kentucky.

[fol. 15] EXHIBIT B TO PETITION TO QUASH

Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.

F. M. Curtis, F. P. A.

Approved.

M. W. Moore, Asst. U. S. Attorney.

Sworn to before me and subscribed in my presence this October 15, 1931. Edw. W. Pflueger, United States Commissioner.

Affidavit for Search Warrant

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Be It Remembered, That on this day, before Edw. W. Pflueger, a United States Commissioner for the Eastern District of Kentucky, came H. B. Sandlin, a Federal Prohibition Agent, who being duly sworn, deposes and says there is probable cause to believe, and he does believe that the laws of the United States, particularly The National Prohibition Act, are being violated by reason of the fact that intoxicating liquor, to-wit: whiskey & still is being unlawfully possessed, manufactured and sold, and possessed for sale on the premises situate in County of Campbell, and State of Kentucky, and within the district above named, occupied by persons unknown, to-wit: Premises known as No. 18 Lorraine Court, Woodlawn, Campbell County, Kentucky.

Said charge is supported by facts sets forth in the affidavit (hereto attached) of F. M. Curtis, F. P. A. Wherefore affiant applies for a Search Warrant authorizing the search of said premises for, and seizure of, evidence of said violations.

H. B. Sandlin, F. P. A. (Affiant).

[fol. 16] Sworn to before me and subscribed in my presence this Oct. 15, 1931. Edw. W. Pflueger, United States Commissioner as Aforesaid. (Seal.)

This cause coming on for hearing on the application for a search warrant supported by the affidavit above set forth, the undersigned Commissioner thereupon being satisfied that there is probable cause to believe that the grounds set forth in said application and affidavit exist, and that the law is being violated as charged, does hereby so find.

Edw. W. Pflueger, United States Commissioner as Aforesaid.

I, Edw. W. Pflueger, U. S. Commissioner, for the Eastern District of Kentucky do hereby certify that the foregoing is a true and correct copy of the original affidavit for search warrant, for premises at No. 18 Lorraine Court, Newport, Ky., as appears from the records at my office at Covington.

Edw. W. Pflueger, U. S. Commissioner. (Seal.)

IN UNITED STATES DISTRICT COURT

VERDICT—October 21, 1931

This cause coming on for trial, came the parties plaintiff and defendant, by counsel. Thereupon comes a jury of the district, to-wit:

Edwin C. Rabe, M. C. Butler, C. A. Kelley, Oscar Browning, Kenne Lillard, J. W. Elliott, Marvin Kendall, Henry Juett, N. P. Mitchell, Charles Brothers, Donald C. Wayman and Thomas Raney, who were duly sworn to well and truly try the issues joined. The jury heard the testimony for plaintiff. Came the defendant, by counsel, and moved the [fol. 17] court for peremptory instructions to find the defendant not guilty, and the court being fully advised, overrules said motion to which ruling of the court the defendant, by counsel, objects and excepts. No evidence was introduced for defendant. The jury herein upon their oaths say the defendant is guilty, and said defendant is committed to the custody of the marshal to await the further order of the court.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL AND MOTION FOR ARREST OF JUDGMENT—October 26, 1931

Came the defendant, by counsel, and filed motion and grounds for new trial herein, and the court being fully advised, it is ordered that said motion be and the same is overruled, to which ruling of the court, defendant, by counsel, objects and excepts.

Came the defendant, by counsel, and filed Motion for arrest of judgment herein, and the court being fully advised, it is ordered that the said motion be and the same is overruled, to which ruling of the court, defendant, by counsel, objects and excepts.

A. M. J. Cochran, Judge.

[fol. 18] IN UNITED STATES DISTRICT COURT

MOTION AND GROUNDS FOR A NEW TRIAL—Filed October 26, 1931

The defendant moves the court to set aside the verdict herein and grant him a new trial for the following reasons:

1st. Because the verdict of the jury is contrary to the law and the evidence.

2nd. Because the court erred in admitting incompetent and immaterial evidence against the defendant, to which the defendant objected and excepted at the time.

3rd. Because the court erred in overruling the defendant's motion to quash the search warrant and suppress the evidence thereunder obtained, to which the defendant objected and excepted at the time.

4. Because the court erred in admitting in evidence the testimony of the witnesses with reference to the articles and property found in the residence of the defendant, and in admitting in evidence the testimony of the several witnesses with reference to the admissions obtained from the defendant at his residence and at the time when the officers and witnesses were there under the search warrant, to all of which the defendant objected and excepted at the time.

5th. Because the court erred in overruling the defendant's motion for a peremptory instruction made at the conclusion of the testimony for the United States, to which ruling the defendant objected and excepted at the time.

6th. The court instructed the jury that the evidence obtained under the search warrant, to-wit: the still, fermenters, moonshine whisky, mash, rubber hose and empty cans, were evidence tending to establish the truth of the charge of manufacturing whisky, and further instructed the jury that the search was legal and the evidence introduced was competent evidence, and the defendant says that the court erred in these respects.

7th. The verdict of the jury found the defendant guilty without specifying the count on which he was found guilty. The court erred in receiving and filing this verdict.

8th. The court erred in failing to instruct the jury on the second count of the indictment with reference to the possession of intoxicating liquor and of property designed for the manufacture of intoxicating liquor. The defendant ob-
[fol. 19] jected and excepted to these charges of the court.

C. B. Thompson, Stephens L. Blakely, Attorneys for Defendant.

In United States District Court

Motion for Arrest of Judgment—Filed October 26, 1931

The defendant, William Grau, moves the court for an arrest of judgment on each and every count of the indictmen herein upon which this defendant was convicted:

1st. Because the facts herein do not constitute an offense against the United States.

2nd. The facts adduced in the trial of this case are insufficient to support a conviction under said indictment or any count thereof.

3rd. The instructions of the court did not authorize the jury to find a verdict of guilty on the charge of possession.

4th. The verdict of the jury did not specify on which count it found the defendant guilty.

5th. The indictment did not charge the offense of sale upon which alone a search of defendant's residence could be legally made.

C. B. Thompson, Stephens L. Blakely, Attorneys for defendant.

[fol. 20] In United States District Court

Order of Sentence—Entered October 26, 1931

The defendant having heretofore been convicted and having nothing further to say is sentenced to be imprisoned in the United States Penitentiary, Atlanta, Georgia, for a period of five years.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed October 26, 1931

To the District Attorney for the Eastern District of Kentucky:

Comes counsel for the defendant and herewith serves notice to the District Attorney for the Eastern District of Kentucky that the defendant will appeal from the judgment heretofore rendered in said cause to the United States Court of Appeals, for the reasons set forth in the motion and grounds heretofore set forth for a new trial.

C. B. Thompson, Stephens L. Blakely, Attorneys for defendant.

Accepted this 26th day of October, 1931. Sawyer A. Smith, District Attorney.

[fol. 21] IN UNITED STATES DISTRICT COURT

PETITION FOR AN APPEAL AND BAIL—Filed October 26, 1931

Now comes the defendant, William Grau, and says that on or about the 26th day of October, 1931, this Honorable Court entered a judgment herein in favor of the United States of America and against this defendant and in which judgment and proceedings had prior thereto in this case, certain errors were permitted to the prejudice of the defendant, all of which, more in detail, appear in the assignment of errors and motion and grounds for a new trial which are filed with this petition.

Wherefore, the defendant, William Grau, prays that a writ of error or appeal be issued in his behalf out of the United States Circuit Court of Appeals for the Sixth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Circuit Court of Appeals for the Sixth Circuit of the United States, and that the writ of error or appeal, pending the determination of the proceedings on the writ or appeal, operate as a supersedeas and that this defendant be admitted to bail on said appeal.

C. B. Thompson, Stephens L. Blakely, Attorneys for defendant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered October 26, 1931

Upon the reading of the petition of the defendant, William Grau, it is ordered that the appeal be and the same is hereby allowed to said petition from the United States District Court for the Eastern District of Kentucky to the United States Circuit Court of Appeals, for the Sixth Circuit, as prayed in said petition. It is further ordered that the defendant execute a bond on the appeal in the sum of five hundred ($500.00) dollars.

A. M. J. Cochran, Judge.

[fol. 22] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed October 26, 1931

The defendant, William Grau, by Charlton B. Thompson and Stephens L. Blakely, his counsel, in connection with his petition for an appeal, makes the following assignment of errors, which he alleges occurred upon the trial of said cause and procedings had therein and upon which he will rely on the prosecution of proceedings on appeal in the above styled cause, to-wit:

1st. The court erred in denying the petition and overruling the motion of the defendant made in advance of the trial to quash the search warrant herein and to suppress all evidence and information obtained by the unlawful search of the defendant's residence thereunder, said search having been made in violation of the Fourth Amendment to the Constitution of the United States and of certain statutes of the United States and the introduction of evidence so secured being in violation of the Fifth Amendment to the Constitution of the United States and of said statutes all of which is fully set out in said petition. To said order overruling this motion, the defendant, William Grau, excepted.

2nd. The court erred in admitting over the objection and exception of the defendant the testimony of F. M. Curtis, H. B. Sandlin and J. T. Tartar concerning the information

secured in the illegal search of defendant's residence.

3rd. The court erred, over the exception of this defendant, in overruling the motion made at the conclusion of the evidence of the United States to instruct the jury peremptorily to find the defendant not guilty under each county of the indictment on the grounds:

First. That there was no evidence of the manufacture of intoxicating liquors, and

Second. That all of the evidence introduced at the trial was illegally obtained by an illegal search of the defendant's residence in violation of said statutes of the United States and of the Fourth and Fifth Amendments to the Constitution of the United States.

Third. The verdict of the jury is contrary to the evidence and is not supported by any evidence.

Wherefore defendant and appellant pray that the judgment in error may be reversed.

C. B. Thompson, Stephens L. Blakely, Attorneys for defendant.

[fol. 23] In United States District Court

Order for Appearance Bond—Entered October 26, 1931

It appearing to the Court that order has been entered allowing appeal to the United States Circuit Court of Appeals: It is now ordered that the defendant be permitted to execute bond in the sum of $5,000.00 for his appearance when called by this court.

A. M. J. Cochran, Judge.

In United States District Court

Præcipe for Transcript—Filed October 28, 1931

To the Honorable S. W. Stacey, Clerk of the United States District Court for the Eastern District of Kentucky:

You will please copy the entire record in the above styled cause to be filed in the Circuit Court of Appeals.

Charlton B. Thompson, Stephens L. Blakely, Attorneys for Defendant.

[fol. 24] Citation, in usual form, showing service on Sawyer A. Smith, omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed November 9, 1931

The witness, F. M. CURTIS testified as follows:

My name is F. M. Curtis and I am a Federal Prohibition Officer. On or about October 15, 1931, I went to No. 18 Loraine Court, Newport.

Thereupon Mr. Charlton B. Thompson, one of the attorneys for the defendant, objected and stated: If the court please, we want the record to show, without objecting any further, that we object to all of this evidence, on the ground that the evidence was illegally obtained. The court then said: Yes, it is all in over your objection and exception.

The witness thereupon continued: William Grau, the defendant was living there. I found a two hundred gallon copper still, complete, 32 Fifteen gallon fermenters, 1,600 gallons of still beer or mash, 350 gallons of whiskey, a copper whiskey tank, 200 empty gallon cans, 12 gas burners, 2 electric motors and 100 feet of two inch rubber hose. This was found in the basement. Defendant lived at this place and came in while we were there. Deputy administrator, J. T. Tartar, Investigator Keaton and agents, Sandlin and Redman were with me. This was in Campbell County in the Eastern District of Kentucky. Grau told us he had been in there about three week- I think, and that somebody told him the finger was on him and he should move out, or something like that.

Cross-examination.

By Mr. Stephens L. Blakely:

I had a search warrant when I went there. This place was a private residence, Mr. Grau lived there. Mr. Grau's wife was there when we got there and her mother or his mother, I don't know which. There were some children, some boys came in there after we got there. I don't know whether there were any there when we went or not.

The witness H. B. SANDLIN testified as follows:

My name is H. B. Sandlin and I am a Federal Prohibition Officer. On or about the 15th day of October, 1931, I went with Mr. Curtis and the other officers and searched the premises of William Grau. I found a two hundred gallon copper still complete, 32 fifty gallon fermenters, 1,600 gallons of still beer, 350 gallons of moonshine whiskey, 50 gallon copper whisky tank, 200 empty jacket cans in cartons, about two hundred feet of rubber hose and other articles used in the manufacture of liquor. This property [fol. 26] was located in the basement of the residence of Mr. William Grau, 18 Loraine Court, Newport, Kentucky. Mr. Grau came in after we began destroying the still. This was his residence, his home and he said he had been there about three weeks, and he had information that they had their finger on him and he was going to move out.

The witness J. T. TARTAR testified as follows:

My name is J. T. Tartar and I hold the position of deputy administrator and my office is at Lexington, Kentucky. I went along with the officers on the occasion testified to. We found one 200 gallon copper still, 32 fifty gallon fermenters, 350 gallons moonshine whisky, 1,600 gallons of mash, about 200 feet of rubber hose and about 200 empty whisky cans. This was all located in the basement of the house and the defendant said he had been there about three weeks, operating about three weeks. This was the defendant's home.

Thereupon the defendant moved for a peremptory instruction to find the defendant not guilty, which motion was overruled. Thereupon the defendant rested and Mr. Stephens L. Blakely, one of the attorneys for the defendant stated:

"We would like for our motion for a peremptory instruction to go to each separate charge, the charge of manufacturing and the charge of possession. And, we move for a peremptory instruction on the ground that the evidence does not show that there was any manufacture there and on the further ground that the evidence was illegally obtained."

Thereupon the court overruled the motion, to which ruling of the court the defendant excepted.

Thereupon, the court charged the jury as follows:

"GENTLEMEN OF THE JURY, the defendant in this case is charged with the offense of manufacturing whiskey for beverage purposes, and having in his possession articles designed for that purpose. If you believe from the evidence beyond a reasonable doubt that the defendant did manufacture whisky *whisky* for beverage purposes in the house described here in the evidence, you will find him guilty; otherwise acquit him. He is presumed to be inno- [fol. 27] cent until proven guilty beyond a reasonable doubt, which presumption is an item of evidence in his favor until you are satisfied beyond a reasonable doubt of his guilt.

"It was brought out in the evidence here, that this was the defendant's home—his residence, where he lived with his family, and the home could not be searched except under a search warrant. There was a search warrant here and the search was legal, and the evidence introduced here tending to establish the truth of the charge, was competent evidence. So, if you believe from this evidence beyond a reasonable doubt, that he was manufacturing whisky, you should find him guilty; otherwise acquit him. Give the jury the indictment."

Thereupon the defendant objected to the instructions of the court on the ground that there was no evidence of manufacture and also on the ground that the search was illegal.

The defendant, William Grau, tenders this Bill of Exceptions and on the motion of William Grau said above Bill of Exceptions is examined, signed, attested and approved by the court. Said testimony as hereinabove set out, purporting to be the stenographer's report, is examined, signed, approved and attested and it is now ordered that same be filed and made part of the record without being spread on the order book and it is now certified that this Bill of Exceptions contains all of the evidence in the case.

A. M. J. Cochran, Judge.

Approved.

Sawyer A. Smith, Attorney for Plaintiff. C. B. Thompson, Stephens L. Blakely, Attorneys for Defendant.

[fol. 28] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29] Minute entry of argument and submission February 2, 1932, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Filed March 11, 1932

Appeal from the District Court of the United States for the Eastern District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed March 11, 1932

Before Moorman, Hicks, and Hickenlooper, Circuit Judges

HICKENLOOPER, Circuit Judge:

The only question presented by this appeal is that of the constitutionality and validity, under the Fourth Amend-
[fol. 30] ment and the National Prohibition Act, of a search of the private dwelling of appellant and the seizure there of a still and large quantities of intoxicating liquor, mash, etc. The warrant under which the search was conducted, in compliance, or attempted compliance, with Paragraph 6 of the Act of June 15, 1917, ch. 30, 40 Stat. 228, stated that whereas F. M. Curtis and H. S. Sandlin had made oath as complainants, and had presented their written affidavits "alleging that intoxicating liquors and prop-

erty designed for the manufacture of intoxicating liquor have been and are being possessed, used and sold upon the premises hereinafter described," which premises were those searched, the said Curtis and Sandlin, national prohibition agents, were commanded to search such premises for the property specified. We are of the opinion that the form of the warrant was sufficient compliance with the requirement of Paragraph 6 of the Act of June 15, 1917, that it shall state "the particular grounds or probable cause" for the issue of the warrant and the names of the persons whose affidavits have been taken in support thereof. The only question remaining, therefore, is whether the affidavits showed the existence of such facts and circumstances as to constitute probable cause, not only that intoxicating liquors were possessed at the premises with intent to use them in violation of the National Prohibition Act, but also that the private dwelling to be searched was "being used for the unlawful sale of intoxicating liquor" or that it was "in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house." Section 25, Title II, National Prohibition Act.

We find an authoritative definition as to what constitutes probable cause in Dumbra v. United States, 268 U. S. 435, 441. Under the definition there given there would be no doubt that the affidavit set forth facts and circumstances constituting probable cause for the belief that intoxicating liquors and property designed for the manufacture of intoxicating liquors were possessed on the premises to be searched with intent to use them in violation of the National Prohibition Act. The affidavit of F. M. Curtis averred that on or about October 14, 1931, "he went around and about the premises hereinafter described and [fol. 31] saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans, apparently heavily loaded away from there, and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises." The only serious question is whether this affidavit is sufficient to justify the search under Section 25 of the National Prohibition Act.

We here again expressly abstain from decision of the question whether the manufacture of intoxicating liquor in large quantities in a dwelling house may be of such commercial character as to justify a search warrant on the theory that the dwelling is used in part for a business purpose. Compare Staker v. United States, 5 F. (2d) 312 (C. C. A. 6); Kasprowicz v. United States, 20 F. (2d) 506 (C. C. A. 6). In the first of these cases we recognized the doctrine that the National Prohibition Act does not authorize the issuance of a search warrant for a dwelling house merely because it is being used for the manufacture of liquor; in the second we held that the unlawful sale of intoxicating liquor required by Section 25 need not be a sale over a counter, or for consumption upon the premises, but that the section is satisfied by an affidavit establishing probable cause for the charge that the premises are being used for the prosecution of commercial sales, involving not only manufacture, but storage, delivery to purchasers, the filling of orders, and, generally, the maintenance of the premises to be searched as a headquarters for supervising a selling business.

We are not convinced that the position taken in the Kasprowicz case is untenable. One does not manufacture liquor for his own use in such quantities as to require wholesale deliveries of corn sugar or the other ingredients of mash; and whiskey so manufactured for personal use is not ordinarily shipped from the premises in cans, by automobile or truckload; nor are the cans in such case subsequently returned for refilling. Under the criterion established by Dumbra v. United States, such allegations are clearly adapted to warrant the belief that the dwelling is being used as headquarters for the merchandising of [fol. 32] liquor. This, we affirm, is sufficient compliance with the requirement of Section 25 that a dwelling may be searched if "being used for the unlawful sale of intoxicating liquor."

The judgment of the District Court is affirmed.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 23, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 43

Office Supreme Court, U.S.
FILED
APR 21 1932
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1931

WILLIAM GRAU,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

CHARLTON B. THOMPSON,
Covington, Kentucky,
STEPHENS L. BLAKELY,
Covington, Kentucky,
Attorneys for Petitioner.

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No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1931

WILLIAM GRAU,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable the Supreme Court of the United States:

The petition of William Grau respectfully shows to this Honorable Court:

That this is a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit rendered on March 11, 1932 (R. 29), which affirmed a judgment of the United States District Court for the Eastern District of Kentucky.

At the October, 1931, term of said District Court your petitioner was indicted under the National Prohibition Act. The indictment contained two counts. The first count charged him with the unlawful manufacture of whisky,

and the second count charged him with the possession of property designed for the unlawful manufacture of intoxicating liquor (R. 1-2). At the trial your petitioner was found guilty generally and was sentenced to be imprisoned in the penitentiary at Atlanta, Georgia, for a period of five years (R. 20).

All the evidence against your petitioner at the trial had been secured by means of a search warrant under which his private residence was searched by federal officers (R. 9).

Before the trial your petitioner filed a petition to quash the search warrant and to suppress the evidence and information secured through the search thereunder, upon the grounds that the search warrant was illegal on its face because it did not state the particular grounds for its issual, and that the affidavits on which it was based were insufficient because they stated no facts showing sales of liquor in the residence of the petitioner, as required by Section 25, Title II, National Prohibition Act. The petition was overruled and an exception was saved (R. 4).

An appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, which on March 11, 1932, affirmed the judgment of the District Court (R. 29).

A certified copy of the entire record of said case in said Circuit Court of Appeals is hereby furnished, attached and made a part of this application and marked Exhibit "A" in compliance with rule 35 of this Honorable Court.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its determination in conformity with the provisions of section 240, Judicial Code.

THE QUESTIONS OF LAW INVOLVED.

Two questions of law are involved. The petitioner contends that:

First:

THE SEARCH WARRANT IS ILLEGAL ON ITS FACE BECAUSE IT DOES NOT STATE THE PARTICULAR GROUNDS FOR ITS ISSUAL.

Second:

NEITHER OF THE TWO AFFIDAVITS ON WHICH THE SEARCH WARRANT WAS ISSUED STATES ANY FACTS SHOWING SALES OF LIQUOR IN THE PRIVATE RESIDENCE SEARCHED.

I. THE SEARCH WARRANT.

The first paragraph of the Search Warrant (R. 12-14), which contains all the language relevant under the first contention, reads as follows:

> "Whereas, F. M. Curtis and H. B. Sandlin has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described, as a means of committing a felony or misdemeanor against the United States; and whereas said complainant, before the issuing of this warrant, has been examined on oath by the undersigned Commissioner, and that probable cause, supported by said affidavit, has been shown that said property is being used to commit a felony or misdemeanor, to-wit: unlawful manufacture, possession and sale of intoxicating liquor (whisky & still); and whereas said affidavit names the person and particularly describes the property and place to be searched and sets forth the facts tending to establish the grounds of the application or probable cause for believing that they exist; and whereas the undersigned Commissioner is now satisfied of the existence of the grounds of the application for this warrant and that there is probable cause to believe their existence,"

The recital that affidavits have been filed "alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described," is a conclusion. If regarded as a quotation from the affidavits it shows the affidavits stated no facts and were insufficient. If regarded as a conclusion from the facts stated in the affidavits the warrant is defective because it does not state the "particular grounds" for its issual. In either event the warrant is unlawful.

The opinion of the Circuit Court of Appeals (R. 30) holds that the recital quoted is a sufficient compliance with section 6, Title XI, Act of June 15, 1917, 40 Stats. 228, requiring that the warrant state the particular grounds or probable cause for its issue. In this respect the decision is in conflict with

Giles v. *United States,* 284 Fed. 208, C. C. A. First Circuit, which held an almost identical recital insufficient under section 6. It is in conflict also with

Rosario Maccieno v. *United States,* 270 U. S. 629. In that case the judgment of the Circuit Court of Appeals for the Sixth Circuit, 9 Fed. (2d) 61, upholding a warrant containing the same kind of conclusions was reversed. The report in 270 U. S. 629 says merely:

> "Petition for certiorari granted and the judgment of the Circuit Court of Appeals reversed on confession of error by the Government, with directions to remand the case to the United States District Court for the Northern District of Ohio for a new trial."

However, though there was no opinion, the first point urged in the petition for a writ of certiorari in the *Maccieno* case was that the search warrant was defective in that it did not state the facts showing the grounds for its issual.

II. THE AFFIDAVITS.

The two affidavits on which the search warrants were issued are set out on page 15 of the Record. The first affidavit was made by F. M. Curtis and reads as follows:

> "Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.
>
> F. M. Curtis, F. P. A."

The only definite statement of fact in this affidavit is that the affiant "smelled odors and fumes of cooking mash coming from the place." This allegation, however, does not satisfy section 25, Title II, of the National Prohibition Act, which requires proof of sales to justify a warrant for the search of a private residence. The statements about the hauling of cans commonly used in handling whisky and what appeared to be corn sugar, indicate mere conclusions; and do not even tend to show sales of whisky on the premises. The affidavit does not charge sales, nor state that the premises described were a private residence. So far as appears from the proceedings, the Commissioner may have issued the warrant in the belief that the premises were a store or a warehouse which might be searched on evidence of manufacture or possession of whisky.

This is the only affidavit considered in the opinion of the Circuit Court of Appeals, which held it sufficient (R. 30-31-32).

The second affidavit, made by H. B. Sandlin, reads as follows:

> "Be It Remembered, That on this day, before Edw. W. Pflueger, a United States Commissioner for the Eastern District of Kentucky, came H. B. Sandlin, a Federal Prohibition Agent, who being duly sworn, deposes and says there is probable cause to believe, and he does believe that the laws of the United States particularly The National Prohibition Act, are being violated by reason of the fact that intoxicating liquor, to-wit: whiskey & still is being unlawfully possessed, manufactured and sold, and possessed for sale on the premises situate in County of Campbell and State of Kentucky, and within the district above named, occupied by persons unknown, to-wit:
>
> premises known as No. 18 Lorraine Court, Woodlawn, Campbell County, Kentucky.
>
> Said charge is supported by facts set forth in the affidavit (hereto attached) of F. M. Curtis, F. P. A. Wherefore affiant applies for a Search Warrant authorizing the search of said premises for, and seizure of, evidence of said violations.
>
> H. B. Sandlin, F. P. A. (Affiant)"

This affidavit was not discussed in the opinion of the Circuit Court of Appeals (R. 29-32). The affidavit is on belief only and is clearly insufficient under *Byars* v. *United States,* 273 U. S. 28.

The ruling that the first affidavit, that of F. M. Curtis, was sufficient under Section 25, Title II, of the National Prohibition Act, is in conflict with *Simmons* v. *United States,* 18 Fed. (2d) 85, decided by the Circuit Court of Appeals for the Eighth Circuit. The substance of the affidavit on which the search warrant was issued in that case is set out in the warrant on page 88 of the report. It reads as follows:

> "Proof by affidavit having this day been made before me by H. C. Coates that he believes intoxicating

liquors are kept for the purpose of sale in the eight or nine room house on Section 22 TP. 7 N. Range 12 East in Okfuskee County, Oklahoma, owned by Ed. Holmer and occupied as a joint by Harris Simmons, said house being south and east of Paden on the right side of the road. That said affidavit shows that the place is a place where people congregate for the purpose of buying and selling intoxicating liquors, and is a place where people congregate seemingly sober and leave under the influence of intoxicating liquors."

The judgment against Simmons was reversed by the Circuit Court of Appeals, on the ground that the search warrant was illegal. The opinion on page 88 says concerning the warrant:

"It does state that the affidavit shows the place is one where people congregate for the purpose of buying and selling intoxicating liquors and where people congregated sober and left under the influence of intoxicating liquor. This is based on affiant's belief, and there is nothing in the affidavit, as judged by the terms of the search warrant, to show actual sales or that Coates had any personal knowledge of sales."

In *Maccieno* v. *United States,* 270 U. S. 629, above cited, the affidavit stated no facts except that the affiant had investigated the premises described. It stated also the conclusion that the premises were used for the unlawful possession and sale of liquor. This affidavit was attacked in the petition for certiorari on the ground that it stated no facts. The brief of the Solicitor General, confessing error, states that the affidavit contained conclusions only and did not comply with the Statute. In commenting on the testimony of the prohibition agent who made the affidavit, the brief points out that he did not at any time "see any actual sale of liquor made upon the premises." (Brief of Solicitor General, p. 6.) This seems to indicate the opinion

that proof of actual sales must be made to justify a warrant to search a private residence. So the affidavit in the *Maccieno* case was defective not only because it stated *no* facts but because, like the affidavit in the case at bar, it failed to show sales of liquor.

On the sufficiency of the affidavit the decision of the Court below is, therefore, probably in conflict with the *Maccieno* case.

The *Maccieno* case and the case at bar have the further point in common that while both involved the search of private dwellings, which could be legally searched only on proof of sales, in neither case was the defendant prosecuted for selling liquor.

It is respectfully submitted that the search warrant in this case is illegal on its face; that both affidavits are fatally defective and that the Circuit Court of Appeals erred in affirming the judgment of the District Court and in holding the affidavit sufficient and the search warrant legal.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case entitled William Grau, Appellant v. United States of America, Appellee, No. 6076, to the end that the case may be reviewed and determined by this Court as provided by section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the

Judicial Code, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

WILLIAM GRAU,
Petitioner,

By CHARLTON B. THOMPSON,
STEPHENS L. BLAKELY,
Counsel for Petitioner.

In the Supreme Court of the United States

WILLIAM GRAU,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

There was no opinion by the District Court. The opinion of the Circuit Court of Appeals has not been reported. It was rendered on March 11, 1932, and is copied in the Record (R. 29).

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED.

The judgment for which review is sought was rendered by the United States Circuit Court of Appeals for the Sixth Circuit on March 11, 1932 (R. 29).

The petitioner was indicted under the National Prohibition Act. The evidence against him was all secured by means of a search warrant under which his private residence was searched by federal officers. Before the trial he filed his petition to quash the warrant and to suppress

the evidence secured by the search thereunder upon the grounds: *first*, that the search warrant was invalid on its face because it did not state the particular grounds for its issual, as required by section 6, Title XI, Act of June 15, 1917, 40 Stats. 228; and *second*, because the affidavits did not state facts showing sales of liquor in his residence, as required by Section 25, Title II, of the National Prohibition Act (R. 4 et seq). The petition to quash was overruled, and an exception saved (R. 4). The petitioner was found guilty generally (R. 3 & 17) and was sentenced to be confined in the penitentiary for five years (R. 20). The petitioner appealed from this judgment to the Circuit Court of Appeals and filed assignments of errors involving the overruling of the petition to quash the search warrant and the admission of the evidence secured by the search (R. 22). The judgment was affirmed by the Circuit Court of Appeals (R. 29) and the validity of the search warrant was upheld in the opinion (R. 29-32).

The claims of the petitioner were based on the Fourth Amendment to the Constitution of the United States, on Section 25, Title II, of the National Prohibition Act, and on Sections 3-4-5-6, Title XI, of the Act of June 15, 1917, known as the Espionage Act. The rulings of the lower Court were against his contentions as indicated. The case, therefore, involves the construction of the Fourth Amendment to the Constitution and of the federal statutes referred to.

The statutory provision under which the jurisdiction of this Court is invoked is Section 240, Judicial Code.

The cases relied upon to sustain the jurisdiction are:

Rosario Maccieno v. *United States*, 270 U. S. 629.
Byars v. *United States*, 273 U. S. 28.
United States v. *Berkeness*, 275 U. S. 149.

The case comes within some of the provisions of section 5, Rule 35, of the Supreme Court Rules in that:

(1) The decision of the Circuit Court of Appeals in holding the search warrant sufficient on its face is in conflict with *Giles* v. *United States,* 284 Fed. 208, decided by the Circuit Court of Appeals for the First Circuit; and in holding the affidavit sufficient it is in conflict with *Simmons* v. *United States,* 18 Fed. (2d) 85, decided by the Circuit Court of Appeals for the Eighth Circuit.

(2) The decision of the Court below on both questions is in conflict with *Rosario Maccieno* v. *United States,* 270 U. S. 629.

STATEMENT OF CASE.

The petitioner was indicted under the National Prohibition Act and tried at the October, 1931, term of the District Court of the United States for the Eastern District of Kentucky. The indictment contains two counts. The first count charges the petitioner with the unlawful manufacture of whisky. The second count charges him with the possession of property designed for the unlawful manufacture of intoxicating liquors (R. 1-2). The indictment contains no count charging sales of liquor. At the trial the petitioner was found guilty generally (R. 3 & 17), and was sentenced to be confined in the penitentiary at Atlanta for a period of five years (R. 20).

All the evidence for the prosecution was secured by means of a search warrant under which the private residence of the petitioner was searched by federal officers (R. 9 & 25-26). Before the trial the defendant filed his petition to quash the search warrant and to suppress the evidence and information secured through the illegal

search thereunder (R. 4). The petition was overruled and the defendant saved his exception (R. 4).

The evidence secured through the search was admitted at the trial over the objection and exception of the defendant (R. 25). At the close of the evidence for the United States the defendant moved for a peremptory instruction to find him not guilty on the ground that all the evidence had been illegally obtained. The motion was overruled, and an exception was saved (R. 17 & 26). The defendant offered no evidence (R. 17).

That the premises searched were the private residence of the petitioner, not used in part or at all for any business purpose as alleged in the petition to quash the search warrant (R. 9), is not disputed. All three witnesses for the United States testified at the trial that the premises were the defendant's private residence (R. 25-26), and the Court so instructed the jury (R. 27).

The defense was based entirely on the invalidity of the search warrant and on the admission of the evidence secured through the search. The warrant was challenged in the petition to quash (R. 4 et seq) on two grounds, *first*, that it was invalid on its face because it did not state the particular grounds for its issual, as required by section 6 of Title XI, Act of June 15, 1917, 40 Stat. 228 et seq; and, *second*, that the affidavits on which it was based (R. 15) showed no actual sales of liquor in the residence, as required by section 25, Title II, of the National Prohibition Act.

I. The search warrant (R. 12) recites that affidavits had been filed,

> "alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon premises hereinafter described."

It is contended by the petitioner that this language is a mere conclusion; that the "particular grounds" required to be stated under section 6 of the Act of June 15, 1917, means the grounds of the particular case; that by the provisions of sections 3, 4 and 5 of the Act these grounds can only be *facts* stated in the affidavit, and that these facts must be recited in the warrant, so that it will show on its face whether it was based on sufficient evidence. It is further contended that section 6, read in connection with section 12, shows an intention to place a check on any irregularities by federal officers, because section 12 requires that a copy of the warrant be delivered at the time of the search to the person in charge of the premises. If the copy is delivered and if it shows the facts there can be no alterations in the warrant or in the affidavits to conform to the evidence disclosed by the search.

The sections of the Act of June 15, 1917, cited above, read as follows:

Section 3: A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

Section 4: The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

Section 5: The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

Section 6: If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a Civil officer of the United States duly authorized to enforce or assist in

enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

Section 12: When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property.

II. The only affidavit considered by the Circuit Court of Appeals (R. 30-31) is the affidavit of F. M. Curtis (R. 15). This affidavit reads as follows:

> "Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.
>
> F. M. Curtis, F. P. A."

It is contended by the petitioner that this affidavit is insufficient to justify the warrant to search his residence because it contains no evidence of sales. Section 25, Title II, of the National Prohibition Act provides in part as follows:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used

for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

The Circuit Court of Appeals held that the search warrant complied with the requirements of section 6 of the Act of June 15, 1917, that it shall state the particular grounds or probable cause for its issue (R. 30), and that the affidavit was sufficient under section 25, Title II, of the National Prohibition Act (R. 31-32). The judgment of the District Court was affirmed by the Circuit Court of Appeals (R. 29). It is for a review of this judgment of the Circuit Court of Appeals that the petition for a writ of certiorari is filed.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

The assignments of Errors to be urged are:

The First Assignment: That the Court erred in overruling the petition to quash the search warrant and to suppress the evidence obtained by the unlawful search of the defendant's residence thereunder, in violation of the Fourth and Fifth Amendments to the Constitution of the United States and of certain statutes set out in the petition to quash (R. 22).

Second Assignment: That the Court erred in admitting over the objection and exception of the defendant the testimony of F. M. Curtis, H. B. Sandlin and J. T. Tartar concerning information secured by the illegal search of the defendant's residence (R. 22).

Third Assignment: That the Court erred in overruling the motion of the defendant made at the conclusion of the

evidence of the United States, to instruct the jury peremptorily to find the defendant not guilty under each count of the indictment, for the reason stated in the *second* ground under this assignment, namely, that all the evidence introduced had been secured by an illegal search of the defendant's residence, in violation of said federal statutes and in violation of the Fourth and Fifth Amendments to the Constitution of the United States (R. 22).

SUMMARY OF ARGUMENT.

I.

THE SEARCH WARRANT IS INVALID ON ITS FACE BECAUSE IT DOES NOT STATE THE "PARTICULAR GROUNDS OR PROBABLE CAUSE" FOR ITS ISSUAL AS REQUIRED BY THE STATUTE.

Title XI, Act of June 15, 1917, sections 3, 4, 5, 6, 12, 40 Stats. 228 et seq.

Giles v. *United States*, 284 Fed. 208 (C. C. A. 1st Circuit).

Murby v. *United States*, 293 Fed. 849 (C. C. A. 1st Circuit).

Maccieno v. *United States*, 270 U. S. 629.

Dumbra v. *United States*, 268 U. S. 435.

Boyd v. *United States*, 116 U. S. 616.

Byars v. *United States*, 273 U. S. 28.

II.

THE AFFIDAVITS FURNISHED NO BASIS FOR THE ISSUAL OF THE WARRANT TO SEARCH THE PRIVATE RESIDENCE BECAUSE THEY STATE NO FACTS SHOWING ACTUAL SALES OF LIQUOR ON THE PREMISES.

Section 25, Title II, National Prohibition Act.

Espionage Act, Title XI, Act of June 15, 1917, sections 3, 4, 5.

Fourth Amendment to Federal Constitution.

Simmons v. *United States*, 18 Fed. (2d) 85 (C. C. A. 8th Circuit).

Boyd v. *United States*, 116 U. S. 616.

Byars v. *United States*, 273 U. S. 28.

Gouled v. *United States*, 255 U. S. 298.

Go-Bart v. *United States*, 282 U. S. 344.

ARGUMENT.

I. The Search Warrant.

The search warrant is invalid on its face because it does not state the particular grounds for its issual. The grounds set out are in the first paragraph, which reads as follows (R. 12):

> "Whereas, F. M. Curtis and H. B. Sandlin has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described, as a means of committing a felony or a misdemeanor against the United States, and whereas said complainant, before the issuing of this warrant, has been examined on oath by the undersigned Commissioner, and that probable cause, supported by said affidavit, has been shown that said property is being used to commit a felony or misdemeanor, to-wit: unlawful manufacture, possession and sale of intoxicating liquor (whisky & still); and whereas said affidavit names the person and particularly describes the property and place to be searched and sets forth the facts tending to establish the grounds of the application or probable cause for believing that they exist; and whereas the undersigned Commissioner is now satisfied of the existence of the grounds of the application for this warrant and that there is probable cause to believe their existence,"

The recital of the grounds is contained in the language that affidavits have been presented alleging that, "intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described."

That such a general conclusion is not sufficient under the search warrant statute, Title XI, Act of June 15, 1917,

40 Stats. 228, seems clear from four sections of the act. This Act is adopted by Section 25, Title II, of the National Prohibition Act which provides in part as follows:

> "A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917."

The Fourth Amendment to the Federal Constitution, whose objects are carried out in detail by the search warrant act, reads as follows:

> "The right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Title XI of the Act of June 15, 1917, is found at 40 Stats. 228 et seq. Sections 3, 4, 5, and 6 of this act taken together show clearly what is meant by the term "particular grounds" required by section 6 to be stated in the search warrant. The sections provide as follows:

Section 3: "A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and place to be searched."

Section 4: "The judge or Commissioner must, before issuing the search warrant, examine on oath the complainant and any witness he may produce and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

Section 5: "The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

Section 6: "If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States, duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

From the wording of sections 5 and 6 it appears that the terms "particular grounds" and "probable cause" as used in section 6 means the same thing. "Particular grounds" evidently means the grounds in the particular case. There is no other reason for the use of the word "particular." And the grounds must be the *facts stated in the affidavits,* because by sections 3, 4, and 5 these affidavits are the only basis for the issual of the warrant.

The evident purpose of Congress was to require the warrant to show on its face whether it was based on sufficient grounds. This purpose is not satisfied by a recital that the affidavits allege that "intoxicating liquor and property designed for its manufacture have been and are being possessed, used and sold on the premises." That language besides being a conclusion is at most a *general* statement which would cover every case under the National Prohibition Act.

There is another reason to be drawn from the statute for the requirement in section 6 that the particular grounds be stated in the warrant. It was evidently meant as a check on the federal officers. By requiring that both the grounds for its issual and the names of the affiants be

set forth, it prevents any additions or alterations from being made in the record to conform to the evidence disclosed by the search. If the warrant states the facts required no changes or additions can be made, because section 12 of the Act requires that the officer who seizes property under the warrant must leave a copy of the warrant with the person in whose possession it was found. The provision is as follows:

Section 12: "When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property."

Sections 6 and 12 if enforced furnish a complete check on irregularities. They also prevent surprise at any hearing on the warrant, because the whole case is stated on its face. But to achieve this end both section 6 and section 12 must be complied with. In the case at bar a copy of the warrant was delivered to the petitioner. Section 12 was thus followed, but section 6 was not. The warrant did not state the *facts* contained in the affidavits, and the petitioner was informed only of a set of conclusions so general that any affidavit under the National Prohibition Act would have been included in its terms.

The provisions of Title XI of the Act of June 15, 1917, above quoted, are parts of a carefully drawn code contained in the Espionage Act. This Code consists of twenty-two sections which carry out in detail the principles stated generally in the Fourth Amendment. It is the result of long experience in seeking to prevent unreasonable searches. Its provisions are mandatory.

In *Dumbra* v. *United States*, 268 U. S. 435, the opinion says at page 439:

> "Title XI of the Public Law approved June 15, 1917, known as the 'Espionage Act,' referred to in § 25 of the National Prohibition Act, lays down the procedure which must be followed upon the issue of Search Warrants."

On the mandatory character of this code and on the construction of the phrase "particular grounds" in section 6, our position is fully supported by *Giles* v. *United States*, 284 Fed. 208, decided by the Circuit Court of Appeals for the First Circuit. The case involved the search of a drug-store under a search warrant which was attacked as illegal. The District Court upheld the warrant, and admitted the evidence secured under it. The defendant was convicted. The Circuit Court of Appeals reversed the judgment on the ground that the search warrant was defective. One of the defects pointed out in the opinion was the failure of the warrant to state the particular grounds for its issual. The recital in the warrant was substantially like the recital in the warrant here involved. The warrant condemned in the *Giles* case states (p. 213 Report) that an affidavit had been made before the Commissioner,

> "by D. T. Lordan, Prohibition Agent, alleging that the laws of the United States, namely the National Prohibition Act, have been and are being violated by unlawfully possessing and selling intoxicating liquor at the drug store of D. F. Giles on North Main Street," etc.

The opinion of the Court says at page 215:

> "Nor in the search warrant used in this case was there adequate compliance with the requirements of section 6, supra, requiring that the warrant itself should state the particular grounds or probable cause for its issue * * *"

This language evidently means that the facts must be stated in the warrant, because it did state the conclusions. In the earlier part of the opinion the Court states that the provisions of the search warrant statute must be strictly followed. At page 212 the Court says concerning these provisions:

> "This careful codification of search warrant law leaves little or nothing for implication either as to the extent of the power or the method of its exercise * * *. The provisions of sections 3-6 are declaratory of the most carefully guarded previous judicial determinations of the meaning and scope of the Fourth Amendment to the Constitution of the United States, and of similar provisions in State Constitutions."

In *Murby* v. *United States,* 293 Fed. 849, the Circuit Court of Appeals for the First Circuit held, in effect, that section 12 of the Act of June 15, 1917, above quoted, is mandatory. In that case the return on the search warrant failed to show that a copy had been delivered to the defendant. The Court in holding this to be a fatal defect says at page 853:

> "If in fact this provision (section 12) was complied with, the return should have shown it affirmatively. If it was not complied with, the search warrant proceedings were void, and the evidence obtained thereby inadmissible."

Section 12 and section 6 are of equal importance because together they enforce regularity in the proceedings.

The opinion of the Circuit Court of Appeals in the present case quotes the recital in the search warrant that the witnesses had presented affidavits "alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquor have been and are being possessed,

used and sold upon the premises hereinafter described," and says (R. 30):

> "We are of the opinion that the form of the warrant was sufficient compliance with the requirements of Paragraph 6 of the Act of June 15, 1917, that it shall state 'the particular grounds or probable cause' for the issue of the warrant and the names of the persons whose affidavits have been taken in support thereof."

This language apparently does not question the mandatory character of section 6 but construes it in a way that defeats its evident purpose.

In *Maccieno* v. *United States,* 270 U. S. 629, the search warrant was attacked on the ground that it did not state the facts showing the grounds for its issual. In its statement of the grounds it is substantially like the warrant here involved, and is set out on page 2 in the petition for certiorari in that case. The first paragraph of the warrant which recites the grounds, reads as follows:

> "Whereas complaint on oath, and in writing supported by affidavit, has this day been made before me, Martin J. Monahen, a United States Commissioner for said District, by J. G. Plappert alleging that the laws of the United States, namely, the National Prohibition Act, Oct. 28, 1919, Revised Statutes, have been and are being violated by unlawfully using the premises, being the premises at 2570 East 39th Street, Cleveland, Ohio, and the rooms and places in and about the 2 story frame building, and all outbuildings on the premises, for the unlawful possession and sale of liquor, to-wit, whisky, spirits etc., containing 1.2 of 1% or more of alcohol by volume for beverage purposes. A soft drink place is on the first floor of the main building, basement below and other rooms above, all of which are used in part or solely for the unlawful sale of said liquor. The premises are used and occupied by person or persons, whose name or names are unknown to affiant and being situate in the County of Cuyahoga, and State of Ohio, and within the district above named."

After setting out the warrant, the petition for certiorari in the *Maccieno* case says at page 3:

> "A reading of the warrant will indicate that it does not contain any facts; and that all it sets forth is that the National Prohibition Law was being violated."

The brief of the Solicitor General does not discuss this particular point, though it twice cites *Giles* v. *United States*, 284 Fed. 208, on other questions; and the *Giles* case, before cited, holds that such a recital does not state the particular grounds for the issual of the warrant as required by section 6 of the Search Warrant Code.

The judgment against Maccieno was reversed. The report at 270 U. S. 629 says merely:

> "Petition for certiorari granted and the judgment of the Circuit Court of Appeals reversed on confession of error by the Government, with directions to remand the case to the United States District Court for the Northern District of Ohio for a new trial."

II. The Affidavits.

Neither of the two affidavits shows any actual sales of liquor on the premises. Section 25, Title II, of the National Prohibition Act provides in part as follows:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

That the premises described and searched were a private dwelling occupied as such by the petitioner, and not used in part or at all for any business purpose, is alleged in the petition to quash the search warrant (R. 9), and is

nowhere disputed. It is supported by the evidence of the three witnesses for the prosecution (R. 25-26-27) and the Court instructed the jury that the premises were the private residence of the defendant (R. 27).

Only the affidavit of F. M. Curtis (R. 15) was relied on by the United States or referred to in the opinion of the Circuit Court of Appeals (R. 30-31). It is the only one that states any facts. It reads as follows:

> "Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whisky, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded, away from there and smelled odors and fumes of cooking mash coming from the place, and he says that there is a still and whisky mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.
>
> F. M. Curtis, F. P. A."

We submit that there is nothing in this affidavit to show sales of whisky on the premises. The only statement of a definite fact is the statement that the affiant smelled "odors and fumes of cooking mash coming from the premises." If this shows any offense it shows manufacture. But proof of manufacture, even aided by proof that cans *commonly* used in handling whisky and *apparently* heavily loaded were hauled away, does not prove sales on the premises. In a legal sense it does not even tend to prove sales anywhere. A man found with great quantities of liquor in his possession may be suspected of being in the liquor business, but proof of such possession alone does not tend to prove sales. Nor would evidence of this possession in a

private residence justify a warrant to search the residence. To be held guilty of selling, some particular sale must be proved. It is not enough to show a situation from which an impression may be gotten that some general selling may be going on. Otherwise the offense of possessing, specifically distinguished from the offense of selling by the Statute, would be merged into the greater offense. A warrant to search a private dwelling is one of the most drastic processes of the law. Since it can lawfully be issued only for sales on the premises, the evidence should be at least sufficient to take the case to the jury if submitted at a trial on an indictment for selling. And for this purpose proof of some actual sale would be necessary.

The opinion of the Circuit Court of Appeals clearly shows that the Court did not regard proof of actual sales necessary to justify the search warrant. It says that the National Prohibition Act does not authorize a search warrant for a dwelling merely because it is being used for the manufacture of liquor, but that the Act is satisfied by an affidavit establishing probable cause for the charge that the premises are being used for the prosecution of commercial sales. The opinion then proceeds (R. 31):

> "One does not manufacture liquor for his own use in such quantities as to require wholesale deliveries of corn sugar or the other ingredients of mash; and whisky so manufactured for personal use is not ordinarily shipped from the premises in cans, by automobile or truckload; nor are the cans in such case subsequently returned for refilling. Under the criterion established by *Dumbra* v. *United States* such allegations are clearly adapted to warrant the belief that the dwelling is being used as a headquarters for the merchandising of liquor. This, we reaffirm, is sufficient compliance with the requirement of Section 25 that a dwelling may be searched if 'being used for the unlawful sale of intoxicating liquor.' "

This language seems to assume that the affidavit states that there were wholesale deliveries of corn sugar to the house and that whisky was shipped away in cans by truckload. The affidavit says only that what *appeared* to be corn sugar was hauled to the place and the cans *commonly used* in handling whisky and *apparently* heavily loaded were hauled away in the same car or truck. This at the most states the opinion of the affiant that corn sugar was hauled in and that whisky was hauled away.

The affidavit shows that the agent did not *know* that either of these things happened. And it says nothing whatever about the amount of what appeared to be corn sugar, nor about the number or size of the cans. If this sort of evidence is held sufficient to establish sales on the premises it will not seriously tax the ingenuity of prohibition agents to make a case for the search of a residence wherever there is any evidence of manufacture. There is no way to check the evasion of Section 25, Title II, except by requiring proof of actual sales on the premises.

That proof of actual sales must be made to authorize a warrant to search a private residence is held in *Simmons v. United States,* 18 Fed. (2d) 85, decided by the Circuit Court of Appeals for the Eighth Circuit. In that case the warrant for the search of a private dwelling recites, page 88:

> "Proof by affidavit having this day been made before me by H. C. Coates that he believes intoxicating liquors are kept for the purpose of sale in the eight or nine room house on Sect. 22 Tp. 7 N. range 12 East, in Okfuskee County, Oklahoma, owned by Ed. Holmer and occupied as a joint by Harris Simmons, said house being south and east of Paden on the right side of the road. That said affidavit shows that the place is a place where people congregate for the purpose of buying and selling intoxicating liquors, and is a place where people congregate seemingly sober and leave under the influence of intoxicating liquors."

The Court held the affidavit insufficient. The opinion (p. 88) says in part:

> "This warrant shows on its face that the proof upon which the said state judge based the finding of probable cause is the affidavit of Mr. Coates, and that such affidavit goes only to the extent of showing that Coates *believed* intoxicating liquors were kept for sale in a certain house. It does state that the affidavit shows the place is one where people congregated for the purpose of buying and selling intoxicating liquors and where people congregated sober and left under the influence of intoxicating liquor. This is based on affiant's belief, and there is nothing in the affidavit, as judged by the terms of the search warrant, to show actual sales or that Coates had any personal knowledge of sales."

On the same page (88) the Court says concerning the search of private dwellings:

> "The probable cause for the issuance of such warrant must be based on evidence of sales."

The affidavit of H. B. Sandlin in this case (R. 15) is made on belief only and was not considered by the Court below and is clearly insufficient under *Byars* v. *United States,* 273 U. S. 28.

The Maccieno Case.

The affidavit in *Maccieno* v. *United States,* 270 U. S. 629, is set out on pages 3-4 of the petition for a writ of certiorari in that case, and is referred to on page 5 of the brief of the Solicitor General as being on page 24 of the record. The affidavit reads as follows:

> "Be It Remembered, That on this date, before me, the undersigned, a United States Commissioner for the Northern District of Ohio, Eastern Division, came

J. G. Plappert, F. P. A., who being by me duly sworn, deposes and says that the laws of the United States, namely The National Prohibition Act, Oct. 28, 1919, Revised Statutes, are being violated by reason of the facts, to-wit: Affiant states that he has investigated the premises at 2570 E. 39th St., Cleveland, Ohio, and the rooms and places in and about the 2 story frame building, and all outbuildings located on the premises, and finds that all the same are used in part or solely for the unlawful possession and sale of liquor, to-wit, whiskey, spirits, etc., containing 1.2 of 1% or more of alcohol by volume for beverage purposes. (A soft drink place and) connecting rooms are on the first floor of the main building, basement below and other rooms above, all of which are used in part or solely for the unlawful sale of said liquor. The premises are used and occupied by person or persons, whose name or names are unknown to affiant.

. . . . being premises of . . . .

. . . . and being situated in the County of Cuyahoga and state of Ohio, and within the district above named."

The brief of the Solicitor General (p. 5) expresses the opinion that the affidavit is defective in that no facts are set forth but merely conclusions. On page 6, however, the brief comments on the testimony of the agent who made the affidavit, as follows:

> "The only investigation he had made was that he 'seen machines drive in on the premises,' and smelled the odor of mash, and 'seen men coming there and machines going away' and 'I was convinced there was something being sold there' (R. 13). He admits that he did not at any time see any actual sale of liquor made upon the premises; that the allegations in his affidavit were not based upon actual knowledge of sale, but were rather based 'upon a conclusion which I drew' (R. 14)."

This testimony was quoted for the evident purpose of showing that the conclusions in the affidavit were not even

based on sufficient facts. In other words, if the testimony of the agent had been embodied in the affidavit it would not have justified the issual of the search warrant, because it showed no actual sales of liquor in the residence. This reasoning, if sound, disposes of the affidavit in the present case, because although it contains some facts it shows no actual sales.

An anomalous situation necessarily results from treating such affidavits as sufficient to justify an inference of selling *for the purpose of search.* The same evidence was evidently not considered sufficient to prove selling at the trial, because the indictment contains no sales count (R. 1-2). And the sales count was omitted, notwithstanding the additional evidence secured through the search. The lawyer who drew the indictment evidently realized that manufacture, possession, transportation and selling are different offenses and that proof of one offense does not establish the commission of another. It was only for the purpose of circumventing the requirement that sales be proved for the purpose of the search that this evidence was used to establish selling.

In the *Maccieno* case the brief of the Solicitor General comments with disapproval on a similar situation in that case. The brief (p. 7) says:

> "Though the only ground upon which a warrant may be issued to search a private dwelling is that liquor is sold there, it is to be noticed that the information contained no count charging the defendant with the sale of liquor, except such as is incidental to the nuisance count."

The Construction of Section 25, Title II, National Prohibition Act.

The decision of the Circuit Court of Appeals in the present case certainly restricts the exemption in Section 25, Title II, of the National Prohibition Act within narrow limits. The exemption was intended to be a broad one, confining the search of homes to cases of actual selling. Under the decision of the Court below the restriction is made almost meaningless because selling may be inferred from other offenses which are themselves excluded as grounds for searching houses. This narrow construction seems to reverse the principles of broad construction repeatedly applied by this Court in cases involving the Bill of Rights. These cases have definitely established the rule that the provisions of the Bill of Rights are to be broadly construed and protected against gradual encroachments that seek to deprive them of their effectiveness. And it is in relation to the Fourth Amendment that this principle has been most frequently and most emphatically applied.

Boyd v. *United States,* 116 U. S. 616, which involved the Fourth and Fifth Amendments, laid down the rule (p. 635) that constitutional provisions for the security of person and property should be liberally construed, and protected against stealthy encroachments.

In *Gouled* v. *United States,* 255 U. S. 298, the Court says of the Fourth and Fifth Amendments at page 304:

> "It has repeatedly been decided that these amendments should receive a liberal construction so as to prevent stealthy encroachment upon or gradual depreciation of the rights secured by them, by imperceptible practice of Courts or by well intentioned but mistakenly overzealous executive officers."

In *Go-Bart* v. *United States*, 282 U. S. 344, the Court in speaking of the Fourth Amendment says at page 357:

> "The amendment is to be liberally construed, and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

And in *Byars* v. *United States*, 273 U. S. 28, the Court says at page 33:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and in the Colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right."

The proceedings in the case at bar seem to involve the evils referred to in the cases just cited. They leave no force to section 6 of the Act of June 15, 1917. The construction that a general conclusion in the search warrant is a statement of the particular grounds for its issual, deprives section 6 of the check intended on the issual of warrants without sufficient grounds. The ruling that sales may be inferred from the statements in the affidavits tending to show manufacture and stating a mere belief of transportation, may be classed as a stealthy encroachment on Section 25, Title II, of the National Prohibition Act. The entire proceedings narrow the rights protected by the Fourth Amendment and by the Statutes enacted pursuant to it, and open the door to gross abuse of the search warrant process.

CONCLUSION.

In conclusion, we submit that *Giles* v. *United States,* 284 Fed. 208, fully sustains our position on the invalidity of the search warrant itself; that *Simmons* v. *United States,* 18 Fed. (2d) 85, sustains our position on the insufficiency of the affidavit, and that *Rosario Maccieno* v. *United States,* 270 U. S. 629, considered with the petition for certiorari and the brief of the Solicitor General, sustains us in at least one, if not both, of our contentions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be sustained and that the judgment of the Circuit Court of Appeals should be reversed.

CHARLTON B. THOMPSON,
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Attorneys for Petitioner.

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No. 43

Supreme Court of the United States

OCTOBER TERM, 1932

WILLIAM GRAU,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH DISTRICT.

BRIEF FOR THE PETITIONER

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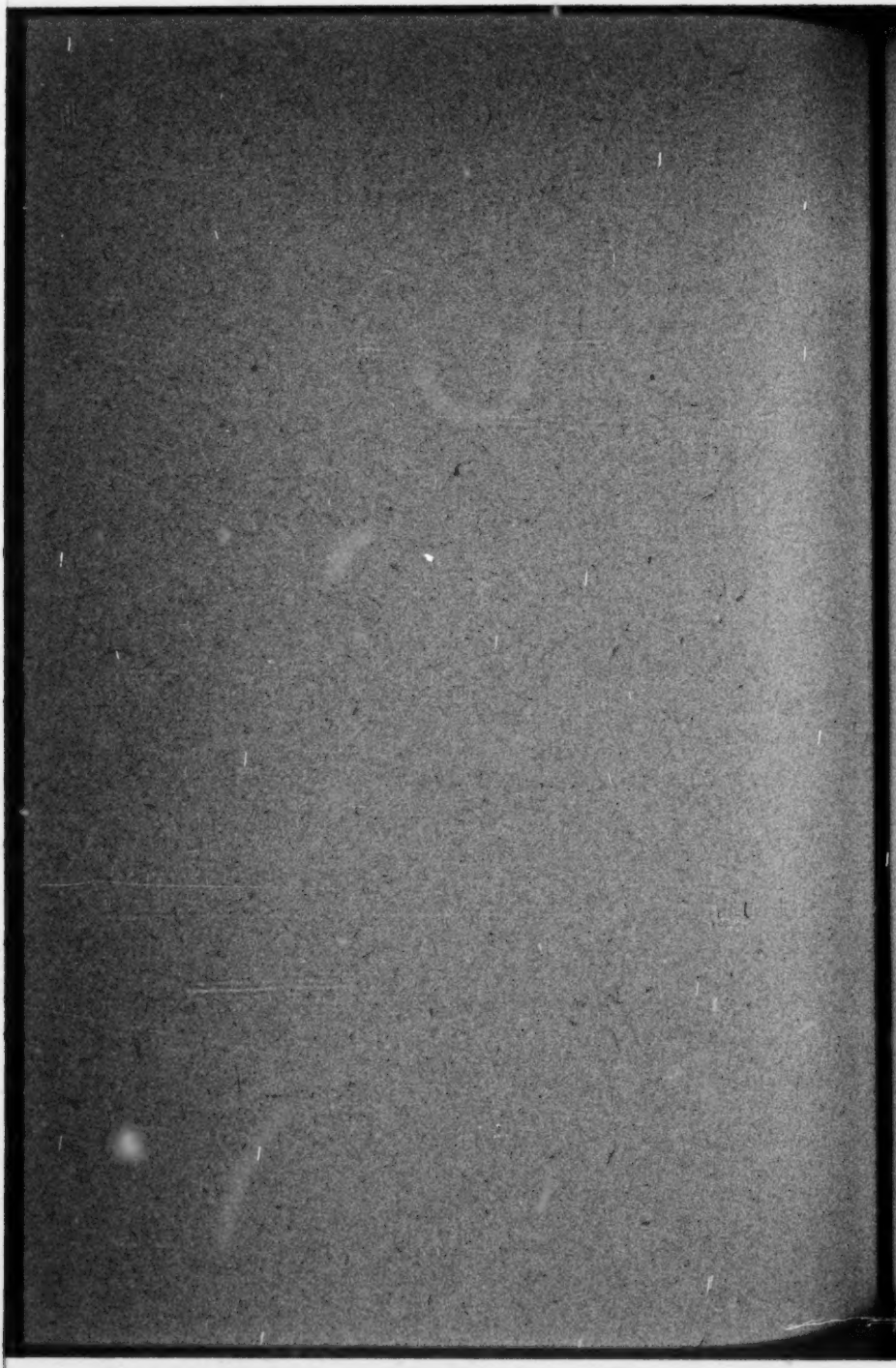

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BRIEF FOR PETITIONER

THE OPINION OF THE COURT BELOW

There was no opinion by the District Court. The opinion of the Circuit Court of Appeals (R. 25-27) is reported in 56 Fed. (2d) 779.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The judgment of the Circuit Court of Appeals was entered March 11, 1932. (R. 25.) The petition for certiorari was filed

April 21, 1932, and was granted May 23, 1932. The case raises questions as to the legality of a warrant issued to search a private residence, and involves a construction of the Fourth and Fifth Amendments to the Constitution, of Section 24, Title II, of the National Prohibition Act, and of Section 6, Title XI, of the Act of June 15, 1917, known as the Espionage Act. These provisions were all construed by the Court below against the contentions of the petitioner.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF CASE

The petitioner was indicted under the National Prohibition Act and tried at the October, 1931, term of the District Court of the United States for the Eastern District of Kentucky. The indictment contains two counts. The first count charges the petitioner with the unlawful manufacture of whisky. The second count charges him with the possession of property designed for the unlawful manufacture of intoxicating liquors (R. 1-2). The indictment contains no count charging the sale of liquor. At the trial the petitioner was found guilty generally (R. 16), and was sentenced to be confined in the penitentiary at Atlanta for a period of five years (R. 18).

All the evidence for the prosecution was secured by means of a search warrant under which the private residence of the petitioner was searched by federal officers (R. 8 & 22-23). Before the trial the defendant filed his petition to quash the search warrant and to suppress the evidence and information secured through the illegal search thereunder (R. 3). The petition was overruled and an exception saved (R. 3).

The evidence secured through the search was admitted at the trial over the objection and exception of the defendant (R. 22). At the close of the evidence for the United States the Defendant moved for a peremptory instruction to find him not guilty on the ground that all the evidence had been illegally obtained. The motion was overruled and an exception saved (R. 23). The defendant offered no evidence (R. 23).

That the premises searched were the private residence of the petitioner, not used in part or at all for any business purpose, as alleged in the petition to quash the search warrant (R. 8), is not disputed. All three witnesses for the United States testified at the trial that the premises were the defendant's private residence (R. 22-23), and the Court so instructed the jury (R. 24).

The defense was based entirely on the invalidity of the search warrant and on the admission of the evidence secured through the search under it. The warrant (R. 4-5) was challenged in the petition to quash (R. 3-11) on two grounds: *first*, that the warrant is illegal on its face because it does not state the particular grounds or probable cause for its issual as required by Section 6, Title XI, of the Espionage Act; and, *second*, that the affidavits are insufficient because they state no facts showing sales of liquor in the residence searched.

I. The grounds for its issual are stated in the opening lines of the search warrant (R. 4). It recites that affidavits had been filed by F. M. Curtis and H. S. Sandlin,

> "alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described," etc.

It is contended by the petitioner that this language is a mere conclusion and does not state the particular grounds or probable cause for the issual of the warrant, as required by Section 6 of the Act of June 15, 1917, *supra*.

II. The only affidavit which states any facts, and the only one considered by the Circuit Court of Appeals (R. 26) is the affidavit of F. M. Curtis (R. 9), which reads as follows:

> "Now comes F. M. Curtis, P. A., and makes oath and states that on or about October 14th, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whisky, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place and he says there is a still and whisky mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky."

It is contended by the petitioner that this affidavit is insufficient to justify the warrant to search his residence because it contains no evidence of sales on the premises as required by Section 25, Title II, of the National Prohibition Act, *supra*.

The Circuit Court of Appeals held that the search warrant complied with the requirements of Section 6 of the Act of June 15, 1917 (R. 26), and that the affidavit was sufficient under Section 25, Title II, of the National Prohibition Act (R. 26-27). The judgment of the District Court was affirmed by the Circuit Court of Appeals (R. 25).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment to the Constitution of the United States provides in part:

> "No person shall be * * *, nor shall be compelled in any criminal case to be a witness against himself."

Title XI of the Act of June 15, 1917, 40 Stat. 228, et seq., Sections 3, 4, 5, 6 and 12 provide as follows:

"*Section 3:* A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and place to be searched."

"*Section 4:* The judge or Commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

"*Section 5:* The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

"*Section 6:* If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States, duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly

authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

"*Section 12:* When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property."

Section 25, Title II, of the National Prohibition Act, 41 Stat. 305, provides in part:

"A search warrant may issue as provided in Title XI of Public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the Court may make thereof. * * * No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

Section 6 of the Act of November 23, 1921, Supplemental to the National Prohibition Act, 42 Stat. 222, provides in part:

"*Section 6:* That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction

thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

The Assignments of Errors to be urged are (R. 20):

1st: The Court erred in denying the petition and overruling the motion of the defendant made in advance of the trial to quash the search warrant herein and to suppress all evidence and information obtained by the unlawful search of the defendant's residence thereunder, said search having been made in violation of the Fourth Amendment to the Constitution of the United States and of certain statutes of the United States and the introduction of evidence so secured being in violation of the Fifth Amendment to the Constitution of the United States and of said statutes, all of which is fully set out in said petition. To said order overruling this motion, the defendant, William Grau, excepted.

2nd: The Court erred in admitting over the objection and exception of the defendant the testimony of F. M. Curtis, H. B. Sandlin and J. T. Tartar concerning the information secured in the illegal search of defendant's residence.

3rd: The Court erred, over the exception of this defendant, in overruling the motion made at the conclusion of the evidence of the United States to instruct the jury peremptorily to find the defendant not guilty under each count of the indictment on the grounds:

Second: That all of the evidence introduced at the trial was illegally obtained by an illegal search of the defendant's residence in violation of said statutes of the United States and of the Fourth and Fifth Amendments to the Constitution of the United States.

ARGUMENT

I

The search warrant is invalid on its face because it does not state the particular grounds or probable cause for its issual as required by Section 6, Title XI, Act of June 15, 1917.

THE MEANING OF SECTION 6, TITLE XI, ACT OF JUNE 15, 1917.

Title XI of the Act of June 15, 1917, known as the Espionage Act, is adopted by Section 25, Title II, of the National Prohibition Act as follows:

> "A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress approved June 15, 1917."

Section 6 of the Act of June 15, 1917, quoted above, requires that the search warrant shall state "the particular grounds or probable cause for its issue." The only grounds for the issual of the warrant here involved are set out in its first paragraph (p. 4) as follows:

> "Whereas, F. M. Curtis and H. S. Sandlin, has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described,"

This language is a mere conclusion. If regarded as a quotation from the affidavits it shows that the affidavits stated no facts and were insufficient. Affidavits for search warrants must state evidence that would be admissible at a trial. *Giles* v. *United States*, 284 Fed. 208 (C. C. A. 1st C.); *Lochnane* v. *United States*, 2 Fed. (2d) 427 (C. C. A. 9 C.); *Wagner* v. *United States*, 8 Fed. (2d) 581, 583 (C. C. A. 8

C.); *Hagen* v. *United States*, 4 Fed. (2d) 801, 802 (C. C. A. 9 C.). If the recital is to be regarded as a *conclusion* from the facts stated in the affidavit the warrant is defective because it does not state the particular grounds for its issual. In either event the warrant is unlawful.

That such a general conclusion is not sufficient under Section 6 of Title XI of the Espionage Act is clear from a reading of that section in connection with Sections 3, 4 and 5. These prior sections all emphasize the necessity of sworn facts as the basis for a search warrant. It is argued by the Respondent that the words "particular grounds" in Section 6 are merely the grounds which the facts must tend to establish under Section 5, and that therefore a statement of the *offenses* charged is sufficient. (Brief in opposition to certiorari p. 8). But this reasoning wholly fails to account for the word "particular" used for the first time in Section 6. This word was inserted apparently for the very purpose of preventing the construction urged by the Respondent. Having in Sections 3 and 5 used the words "probable cause," "grounds" and "facts," the framers of the law through fear that a mere requirement that the "grounds" be stated might be construed as meaning grounds in the sense of conclusions, added the word "particular." By "particular grounds" is meant the grounds of the particular case. And the grounds of the particular case are evidently the *facts stated in the affidavits*, because these facts are the only basis for the issual of the warrant.

The construction urged by the Respondent ignores the very purpose of the provision. Like the other provisions of the Espionage Act it was meant as a check on the improvident issual of search warrants. Search warrants have always been regarded as the most drastic process of the law. For

this reason their issual has from the beginning been regulated by careful restrictions. Checks are applied to test the regularity of the proceedings. Now, what possible check could be supplied by a requirement that the Commissioner state only his own conclusions in the warrant? His conclusions are no test of the sufficiency of the proof. A Commissioner with a vivid imagination might conclude from an affidavit that a man was seen carrying a package from a house, that liquor had been sold there. A recital in the warrant that the affidavit alleged that liquor was being sold on the premises would mean nothing, but a recital of the fact on which the conclusion was based would show that the writ was improperly issued.

The proceedings in the case at bar well illustrate the point. The warrant states the conclusion that the affidavits allege that liquor has been and is being sold on the premises described. But in fact the affidavits do not so allege. It is admitted that the affidavits do not show sales of liquor on the premises. The brief for the Respondent in opposition to certiorari says at page 14: "It is doubtful if the facts therein recited were sufficient to show probable cause that liquor was being sold on the premises." Thus the whole basis for the search of a residence as stated in the warrant is repudiated. What purpose this incorrect recital can serve it is difficult to see. And yet it is argued that it states the particular grounds for the issual of the warrant.

The warrant must plead the case. The evident purpose of Congress was to require the warrant to show on its face whether it was based on sufficient evidence. This purpose is not satisfied by recitals that the affidavits allege that liquor and property designed for its manufacture have been and are being kept, used and sold on the premises described.

That language, besides being a conclusion, is at most a *general* statement which would cover almost every case under the National Prohibition Act. It can not be construed as the particular grounds. "Particular" means "specific," "peculiar," "not general." Webster's International Dictionary.

A recital substantially like the recital in the present warrant was condemned in *Giles* v. *United States,* 284 Fed. (C. C. A. 1st C.). The warrant in the *Giles* case states (p. 213 Report) that an affidavit had been made before the commissioner,

> "by D. T. Lordan, Prohibition Agent, alleging that the laws of the United States, namely the National Prohibition Act, have been and are being violated by unlawfully possessing and selling intoxicating liquor at the drug store of D. F. Giles on North Main Street," etc.

The opinion of the Court says at page 215:

> "Nor in the search warrant used in this case was there adequate compliance with the requirements of Section 6, supra, requiring that the warrant itself should state the particular grounds or probable cause for its issue * * *"

This language shows clearly that under Section 6 the facts must be recited in the warrant, because it did recite the conclusions.

That the sworn facts in the affidavits were intended to be stated in the warrant as a check on federal officers, is clear from other words in Section 6. It provides that if the grounds exist the Judge or Commissioner must issue a warrant "stating the particular grounds or probable cause for its issue, and *the names of the persons whose affidavits have been taken in support thereof.*" (Italics ours.) By

requiring both the specific grounds for its issual and the names of the witnesses to be set forth, the section prevents any additions or alterations in the record to conform to the evidence disclosed by the search. If the warrant states the facts on which it is based and the names of the witnesses, no new affidavits can be filed and no changes can be made in the warrant, because Section 12 of the Act, quoted above, requires that the officer who seizes property must leave a copy of the warrant with the person in whose possession the property was found.

Sections 6 and 12 furnish a complete check on irregularities. They also prevent surprise at a hearing on the warrant, because the whole case is stated on its face. But to achieve this end both Section 6 and Section 12 must be complied with. In the case at bar a copy of the warrant was delivered to the petitioner at the time of the search. Section 12 was thus complied with, but Section 6 was not. The warrant did not state the *facts* contained in the affidavits. These affidavits could have been changed at will and remained consistent with the recital in the warrant. This recital furnished no check on irregularities. It served no purpose at all. Its conclusions would have embraced almost any set of facts in affidavits charging offenses under the National Prohibition Act.

The Meaning of Section 6 is Shown by Other Statutes Drawn From the Same Source.

Light is thrown on the meaning of Section 6 by comparing it with other statutes apparently based on the common law. It appears in the note at page 485 of Quincy's (Mass.) Report, that in 1762 the General Court of Massachusetts passed a bill authorizing a writ or warrant of assistance to

Sheriffs and other officers upon oath in writing, with the name of the person informing and the place informed against, and not otherwise, in the form set out, as follows:

> "Whereas A. B. of his Majesty's Customs hath this day made complaint on oath that (*setting forth the complaint and oath*, with the name of the person complained of)," etc. (Italics ours.)

The Governor did not approve the bill, but it shows the importance attached to having the facts recited in the warrant, and probably embodies the views of the General Court on the common law. It passed the year after Otis had made his celebrated argument against general writs of assistance, in the Colony where the chief struggle against these writs was made. The purpose of the bill was evidently to restore the safeguards of the common law to search warrants.

An old statute of Massachusetts has a similar provision. From the report in *Guenther* v. *Day*, 6 Gray 490, it appears that the Statutes of 1855 C. 215, para. 25 required two complainants for a warrant to search a dwelling and provided that "the offense both in the complaint and warrant shall be *fully, plainly and substantially described.*" (Italics ours.) This language clearly requires the facts to be recited in the warrant.

The requirement that the facts be recited in the warrant is plainly stated in the Massachusetts Prohibition Act of 1922. Chapter 427, Section 49, page 479, "Acts and Resolves of Massachusetts" (1922) after stating the proof necessary for a warrant to search a dwelling house, says:

> "Such complainant shall in his oath state the facts and circumstances on which his belief is founded, *and such allegations shall be recited in the complaint and warrant.*" (Italics ours.)

A similar provision apparently derived from the same source and designed for the same purpose, is found in Section 9164 Compiled Laws of Michigan (1929). The section says in part:

> "The warrant for search shall be directed to the proper officer and shall *recite all the material facts alleged in the affidavit,* and shall describe the things to be searched for and the place to be searched. A warrant for search and seizure in substantially the following form shall be sufficient: (Italics ours.)
>
> "The State of Michigan ..... County, ss:
>
> "To ..... Greeting:
>
> "Whereas there has been filed with the undersigned an affidavit (*here set out the material facts alleged in the affidavit.*" (Italics ours.)
>
> "These are, therefore, to command you," etc.

Search warrants failing to set out the material facts contained in the affidavits as required by the Act, were held illegal in *People* v. *Moten,* 233 Mich. 169, and in *People* v. *Galnt,* 235 Mich. 646. In reversing a conviction based on evidence secured by such a warrant the Court in *People* v. *Moten* said at page 172:

> "It is the general rule that laws authorizing invasion of private premises and the sanctity of the home by search and seizure proceedings are to be strictly construed."

It seems probable that under the common law the entire affidavit must be recited in the warrant. The purpose of statutes which require only the material facts or the particular grounds to be stated are meant to secure brevity, and are not designed to authorize the substitution of a magistrate's conclusions for the common law requirement that the facts be recited.

SECTION 6, TITLE XI, ACT OF JUNE 15, 1917, IS MANDATORY.

That the provisions of Title XI of the Espionage Act are mandatory is supported by overwhelming authority. On this point the text writers seem to be in full accord. These provisions are mandatory because they are designed to prevent the abuse of the most drastic process of the law. It would be futile to adopt a set of provisions for the purpose of regulating officials and then leave their enforcement to the discretion of the very officials sought to be controlled.

Thus, it is laid down generally that both statutory and common law rules must be strictly followed, to make the search warrant valid. The reasons given are the drastic nature of the process and the humiliating effect of its execution. *Cooley's Constitutional Limitations,* 8th Ed., page 618; *Corpus Juris,* vol. 56, para. 108, p. 1209; *Ruling Case Law,* vol. 24, p. 711, quoted in *United States* v. *Rembert,* 284 Fed. 996 (D. C. Texas).

This Court has used language which seems to indicate that the provisions of the search warrant act are mandatory. In *Dumbra* v. *United States,* 268 U. S. 435, the opinion says at page 439:

> "Title XI of the Public Law approved June 15, 1917, known as the 'Espionage Act' referred to in Section 25 of the National Prohibition Act, lays down the rules which must be followed upon the issue of a search warrant."

In *Steele* v. *United States,* 267 U. S. 498, the opinion at page 501 discusses the provisions of the Act in a way that indicates that they must be followed.

These provisions are certainly mandatory in form. The sections here chiefly involved are Sections 3, 4, 5 and 6. Section 3 says that a search warrant *can not* be issued but

upon probable cause. Each of the Sections 4, 5 and 6 says that the things set out *must* be done. So does Section 12. So do the other sections whenever a duty is imposed.

The provisions of Title XI of the Espionage Act form a carefully drawn Code consisting of twenty-two sections. They carry out in detail the principles stated generally in the Fourth Amendment. *Giles* v. *United States,* 284 Fed. 208, *supra.* They are based on the common law and are taken largely from the New York Code of Criminal Procedure, para. 791, et seq. *United States* v. *Yuck Kee,* 281 Fed. 228 (D. C. Minn.); *United States* v. *Maresca,* 266 Fed. 713 (S. D. N. Y.); *Giles* v. *United States,* supra. The sections of the New York Code are taken from the common law. In *People* v. *Kempner,* 208 N. Y. 16, the Court says at page 22:

> "The basis for the search warrant prescribed by the Code, is, however, the same in general character as stated in the Revised Statutes and as established by the old English practice."

Corpus Juris says, vol. 56, para. 108:

> "The federal statute regulating the issuance of search warrants is declaratory of the common law insofar as the procedural sections of the Act are concerned."

The Fourth Amendment must be considered in light of the common law. It specifies a few of the requirements for a lawful search and covers the other requirements by prohibiting unreasonable searches. The Amendment does not specifically say that the affidavits must contain statement of facts, and yet a search under a warrant based on the opinion of a witness would be an "unreasonable" search. It was so held before the Espionage Act in *Ripper* v. *United States,* 178 Fed. 24 (C. C. A. 8 C.). The Amendment does

not say that a return must be required, and yet this requirement of the common law would have been essential. The search warrant Code merely simplifies the procedure and makes it definite. Substantially it is a part of the Fourth Amendment.

A search under a warrant issued in violation of the federal act is an unreasonable search under the amendment, and raises a constitutional question. In *The People* v. *Holcomb*, 3 Parker's Criminal Reports (N. Y.) 656, decided in 1858, the Court says at page 666:

> "Courts should construe statutes in relation to search warrants strictly and see that the specific directions of these statutes are rigidly followed. A search for and seizure of property, not made in the cases and according to the exact mode prescribed by statute, is an unreasonable search and seizure, the right to be secured against which should not be violated (Bill of Rights 2 R. S. 302 para. 11; Const. U. S. Amend. Art. 4)."

All searches that are unlawful are unreasonable. *State* v. *Wills*, 91 W. Va. 659.

The mandatory character of search warrant provisions is plainly upheld in *Guenther* v. *Day*, 6 Gray (Mass.) 490, cited above. This was an action in trespass against a constable who had served a defective search warrant. The defect consisted in the failure of the warrant to recite the names of the two complainants as required by law. The warrant was held illegal. The entire opinion, which was delivered by Chief Justice Shaw, is as follows:

> "The Statutes require the complaint to be fully set forth in the warrant. Sts. 1855, C. 215 para. 25; C. 397, para. 1. It is not so set forth in the warrant; the complainants are nowhere named, and of course the order in the warrant to summon the 'complainants' not

named, to testify, is inoperative and void; and therefore the warrant is erroneous and affords no justification to the defendants."

Hussey v. *Davis,* 58 N. H. 317, decided in 1878, was an action for trespass which the defendant sought to justify as a deputy sheriff executing a search warrant. The warrant had failed to direct the officer to make a return as required by statute. The Court held the warrant defective notwithstanding the fact that the return had been made. The Court said:

> "No search warrant can be lawfully issued but in cases and with the formalities prescribed by law. Bill of Rights, Art. 19. The Common law of search warrants affirmed in the Bill of Rights is of extraordinary strictness. Cooley Const. Lim. 303; Cooley on Torts 295 * * *. In this case as the warrant did not require the officer to make return of his proceedings or of an inventory, it is erroneous and affords no justification to the defendant. *Guenther* v. *Day,* 6 Gray 490. He made return of his proceedings with the prescribed inventory; but the defect in the warrant was not cured by his doing what a valid warrant would have required him to do."

On the mandatory character of the Search Warrant Code, and on the construction of the phrase "particular grounds" in Section 6, our position is fully supported in *Giles* v. *United States,* 284 Fed. 208 (C. C. A. 1st C.). The case involved the search of a drug store under a search warrant which was attached as illegal. The Circuit Court of Appeals reversed the judgment of conviction on the ground that the search warrant was defective. One of the defects pointed out in the opinion was the failure of the warrant to state the particular grounds for its issual. The recital in the warrant was substantially like the recital in the warrant here involved. The warrant condemned in the *Giles* case

states (p. 213 Report) that an affidavit had been made before the Commissioner,

> "by D. T. Lordan, Prohibition Agent, alleging that the laws of the United States, namely the National Prohibition Act, have been and are being violated by unlawfully possessing and selling intoxicating liquor at the drug store of D. F. Giles on North Main Street."

The Court at page 215 holds this recital insufficient under Section 6 as above pointed out. In an earlier part of the opinion the Court says that the provisions of the search warrant act must be strictly followed. Concerning these provisions it is said at page 212:

> "This careful codification of the search warrant law leaves little or nothing for implication either as to the extent of the power or the method of its exercise. It authorizes search and seizure of stolen and embezzled property in conformity with a practice that probably goes back to Lord Coke's time. * * *
>
> "The provisions of Sections 3-6 are declaratory of the most carefully guarded previous judicial determinations of the meaning and scope of the Fourth Amendment to the Constitution of the United States, and of similar provisions in State Constitutions. It need hardly be pointed out that a process issuing to an administrative official which will authorize him at any time of day or night to enter the home or office of any person, breaking doors, windows and opening by force anything within the premises for the purpose of taking possession of articles belonging either to the occupant or falling within the category of outlawed property, is a power capable of such oppressive and liberty-destroying use that it should be strictly guarded and exercised."
>
> "In Archbold's Criminal Practice and Pleading at p. 131 it is said:
>
> 'The proceedings upon search warrants should be strictly legal, for there is not a description of process known to the law the exercise of which is more dis-

> tressing to the citizen. Perhaps there is none which excites such intense feeling in consequence of its humiliating and degrading effects.' "

The identical wording from Archbold just quoted is contained in volume 24, Ruling Case Law, p. 771, referred to in *United States* v. *Rembart*, 284 Fed. 996 (D. C. Tex.), cited above but not quoted. And exactly the same language is used by the Court in *Reed* v. *Rice*, 2 J. J. Marshall (Ky.) 44, decided in 1829.

The effect of the *Giles* case appears in two later cases before the same Court: *Murby* v. *The United States*, 293 Fed. 849, and *Gandreau* v. *United States*, 300 Fed. 21. In both cases the search warrants in a few lines set out the facts stated in the affidavits.

Again in *Leonard* v. *United States*, 6 Fed. (2d) 353, the Circuit Court of Appeals for the First Circuit laid down the rule that the Statute must be strictly construed, in the following language at page 355:

> "Statutes authorizing search warrants are strictly construed. *Guenther* v. *Day*, 6 Gray (Mass.) 490; *Hussey* v. *Davis*, 58 N. H. 317; *Giles* v. *United States*, 284 Fed. 208 (C. C. A.). At common law the direction in the warrant was regarded as an essential part of it" (citing cases). "The directions in these warrants were defective and rendered them invalid."

In *Perry* v. *United States*, 14 Fed. (2d) 88 (C. C. A. 9 C.), referring to *Leonard* v. *United States*, supra, the Court said at page 89:

> "In our opinion that case is well founded upon the principle that statutes which authorize search warrants must be strictly construed. We therefore hold that the direction in the search warrant was an essential part of it, and that because the plain language of the statute was disregarded * * * the objections to the warrant and

to the use of the evidence obtained and the search were well taken and should have been sustained. *United States* v. *Dziadus*, (D. C.) 289 Fed. 837; *United States* v. *Innelli*, (D. C.) 286 Fed. 731."

In *United States* v. *Dziadus*, 289 Fed. 837 (D. C. W. Va.), the Court after referring to Section 25, Title II, of the National Prohibition Act, says at page 839:

> "The warrant at bar must comply with all the provisions of these Congressional directions, or it must be held invalid, and the evidence secured thereunder held inadmissible against the petitioner."

Maccieno v. *United States*, 270 U. S. 629, involved a construction of Section 6 of the Act of June 15, 1917. One ground for the attack on the search warrant in that case was that it did not state the facts on which it was issued. In its statement of the grounds it is substantially like the warrant here involved, and is set out on page 2 of the petition for certiorari in that case. The first paragraph of the warrant recites the grounds in the following language:

> "Whereas complaint on oath, and in writing supported by affidavit, has this day been made before me, Martin J. Monahan, a United States Commissioner for said District, by J. G. Plappert alleging that the laws of the United States, namely, the National Prohibition Act, Oct. 28, 1919, Revised Statutes, have been and are being violated by unlawfully using the premises, being the premises at 2570 East 39th Street, Cleveland, Ohio, and the rooms and places in and about the 2 story frame building, and all outbuildings on the premises, for the unlawful possession and sale of liquor, to-wit: whisky, spirits, etc., containing 1.2 of 1 per cent or more of alcohol by volume for beverage purposes. A soft drink place is on the first floor of the main building, basement below and other rooms above, all of which are used in part or solely for the unlawful sale of said liquor. The premises are used and occupied by person or persons, whose name or names are unknown to

> affiant and being situate in the County of Cuyahoga, and State of Ohio, and within the district above named."

The petition for certiorari in the *Maccieno* case says at page 3:

> "A reading of the warrant will indicate that it does not contain any facts; and that all it sets forth is that the National Prohibition Law was being violated."

The brief of former Solicitor General Mitchell, which confessed error, does not discuss the meaning of the words "particular grounds" in Section 6, but it clearly indicates that he regarded the section as mandatory. For on page 4 the brief quotes the provision that the search warrant shall command the officer to whom it is directed "to search the person or place named for the property specified, and to bring it before the judge or commissioner"; and points out as a fatal objection, that the warrant fails to comply with this direction of the Statute. The brief then says that the same form of warrant was condemned in *Giles* v. *United States,* 284 Fed. 208, cited above. The judgment against Maccieno was reversed. There was no opinion. The grounds of the reversal must be gathered from the petition for certiorari and from the brief of the Solicitor General. The report at 270 U. S. 629 says merely:

> "Petition for certiorari granted and the judgment of the Circuit Court of Appeals reversed on confession of error by the Government, with direction to remand the case to the United States District Court for the Western District of Ohio for a new trial."

The brief opposing certiorari in the case at bar says (p. 6) that provisions like Section 6 in the Espionage Act have almost uniformly been held directory and not mandatory. This statement, we believe, is against overwhelming

authority. It is partly supported only by some rather equivocal decisions on Sections 10, 12 and 13 of the Act. No authority is pointed out which even suggests a doubt as to the mandatory character of Sections 3, 4, 5, or 6, or of the Act as a whole. Section 12, set out in full above, was squarely held to be mandatory in *Murby* v. *United States,* 293 Fed. 849 (C. C. A. 1 Circuit). In that case the return on the warrant failed to show that a copy had been delivered to the defendant. In holding this omission to be fatal, the Court says at page 853:

> "If in fact this provision (Section 12) was complied with, the return should have shown it affirmatively. If it was not complied with the search warrant proceedings were void and the evidence obtained thereby inadmissible."

The Court suggests that if the copy had been in fact delivered the return could have been amended, but that this was not done even after the omission had been pointed out. *United States* v. *Kraus,* 270 Fed. 578 (S. D. N. Y.) and *Rose* v. *United States,* 274 Fed. 245, relied on by the Respondent, are cited on this point.

Gandreau v. *United States,* 300 Fed. 21 (C. C. A. 1 C.) is to the same effect both as to the mandatory character of Section 12 and as to the right to amend the return. *Giles* v. *United States,* 284 Fed. 208, before cited, also holds that the return must show the delivery of a copy.

In *Johnson* v. *United States,* 46 Fed. (2d) 7 (C. C. A. 6 C.), cited by the Respondent, the Court did not hold Section 12 to be directory. In that case a copy of the warrant had been delivered and the only objection under Section 12 was that the copy referred to the wrong judicial district. The Court conceded that a true copy must be delivered, but held the error involved was too trivial to be fatal.

The other point in the case was under Section 10 which provides that a direction shall be inserted in the warrant that it must be served in the daytime unless the affidavits are positive that the property is on the person or in the place to be searched. The warrant involved said: "This warrant shall be served at any time of ——." The Court held that since night was not mentioned, the direction in effect required a daytime search; and that the search having been made in the daytime was lawful. The decision therefore merely construes the language in the warrant and does not impair the force of Section 10.

Nordelli v. *United States,* 24 Fed. (2d) 665 (C. C. A. 9 C.) also relied on by the Respondent, does not hold that Section 12 is directory. It merely construes it as requiring the delivery of a copy of the writ not before the search but after it. The case also holds that the failure to make a complete return as required by Section 13 may be corrected on motion. The Court showed no intention to qualify its own former decision on the mandatory character of the Search Warrant Act, in *Perry* v. *United States,* 14 Fed. (2d) 88, above cited.

In *United States* v. *Yuck Kee,* 281 Fed. 228 (D. C. Minn.), before cited, it was held that both Sections 10 and 12 are mandatory, and the opinion states that the requirement for leaving a copy of the warrant grew up when it became no longer necessary to bring the owner before the magistrate with the property seized under the warrant. From this rule came Section 12 of the Federal Act.

It is true that searches have been upheld under warrants which improperly direct service in the day or night. But in all those cases the searches were actually made in the daytime. Where the warrant improperly directs the search to

be made in the day or night, and it is actually made in the nighttime, the search has been held illegal. *Siden* v. *United States*, 9 Fed. (2d) 241 (C. C. A. 8 C.); *Destefano* v. *United States*, 58 Fed. (2d) 963 (C. C. A. 5 C.).

A return on the warrant has always been regarded as necessary. In the bill passed by the General Court of Massachusetts in 1762 mentioned in the note at page 485 Quincy's Report, above cited, it was required that the return be made in seven days. The failure to direct a return was one of the points of attack made by Otis on general writs of assistance. He said in reciting his objections to the writ:

> "In the next place, it is perpetual; there is no return. A man is accountable to no person for his doings."

The cases cited by the Respondent involve in part matters of construction. Even where they tend to support the position of the Solicitor General, they show that the decisions are only on the exact point involved. Thus, *United States* v. *Callahan*, 17 Fed. (2d) 937, and *United States* v. *Kraus*, 270 Fed. 578, District Court cases, cited against us, both by inference state that Section 11, requiring the warrant to be returned within ten days, is mandatory. We submit that the cases cited in support of the directory character of the Search Warrant Code are of very little weight against the almost uniform authority that they are mandatory. This apparently was not questioned in the present case by the Court below. It merely held that Section 6 was satisfied by the recital in the warrant (R. 26).

II

The affidavits furnished no basis for the issual of the warrant to search a private residence because they state no facts showing sales of liquor on the premises.

Neither of the two affidavits shows any sales of liquor on the premises. Section 25, Title II, of the National Prohibition Act provides in part as follows:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

There were two affidavits. The one made by H. B. Sandlin (R. 10) was not even considered by the Court below (R. 25-27). It is made on belief only and is clearly insufficient under *Byars* v. *United States,* 273 U. S. 28. Only the affidavit of F. M. Curtis (R. 9) was referred to in the opinion. It is the only one that states any facts. It reads as follows:

> "Now comes F. M. Curtis, P. A., and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whisky, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whisky mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn), Newport, Campbell County, Ky."

This affidavit does not charge sales nor state that the premises were a private dwelling. So far as appears from the proceedings, the Commissioner may have issued the warrant in the belief that the premises were a store or a

warehouse, which might be lawfully searched on evidence of manufacture or possession of whisky.

The only statement of a definite fact is that the affiant smelled "odors and fumes of cooking mash coming from the premises." If this statement shows any offense it shows manufacture. But evidence of manufacture, even aided by evidence that cans *commonly* used in handling whisky, and *apparently* heavily loaded, were hauled away, does not prove sales on the premises. This is practically conceded by the Respondent. The brief in opposition to certiorari (p. 14) says with reference to the affidavit: "It is doubtful if the facts therein recited were sufficient to show probable cause that liquor was being sold on the premises." It is then argued that the affidavit was nevertheless adequate to establish probable cause for believing that the dwelling was being used "as a headquarters for the merchandising of liquor."

The same idea is the basis of the decision of the Circuit Court of Appeals. The opinion clearly indicates that the Court did not regard proof of actual selling necessary to justify the search warrant. It does say (R. 27) that the National Prohibition Act does not authorize a search warrant for a dwelling merely because it is being used for the manufacture of liquor, but that Section 25 is satisfied by an affidavit establishing probable cause for the charge that the premises are being used for the prosecution of commercial sales. The opinion then proceeds (R. 27):

> "One does not manufacture liquor for his own use in such quantities as to require wholesale deliveries of corn sugar or the other ingredients of mash; and whisky so manufactured for personal use is not ordinarily shipped from the premises in cans, by automobile or truckload; nor are the cans in such case subsequently returned for refilling. Under the criterion established by *Dumbra* v. *United States* such allegations are clearly

> adapted to warrant the belief that the dwelling is being used as a headquarters for the merchandising of liquor. This, we reaffirm, is sufficient compliance with the requirement of Section 25 that a dwelling may be searched if 'being used for the unlawful sale of intoxicating liquor'."

This language seems to assume that the affidavit states that there were wholesale deliveries of corn sugar to the house and that whisky was shipped away in cans by truckload. The affidavit says only that what *appeared* to be corn sugar was hauled to the place, and that cans *commonly* used in handling whisky and apparently heavily loaded were hauled away in the same car or truck. This at most merely states the belief of the affiant that corn sugar was hauled in and that whisky was hauled away.

The affidavit shows that the agent did not *know* that either of these things occurred. And it says nothing whatever about the amount of what appeared to be corn sugar or why it appeared to be corn sugar, nor about the number or the size or the appearance of the cans. If this sort of evidence is held sufficient to establish the grounds required by Section 25, it will not seriously tax the ingenuity of prohibition agents to make a case for the search of a residence wherever there is any evidence of manufacture.

Although the court below says that proof of manufacture is not sufficient to authorize a warrant to search a dwelling, it holds that the affidavit is sufficient, though the only definite statement of fact in the affidavit concerns manufacture.

Apparently Section 25 is thought by the Court below and by the Respondent not to require proof of sales, because it provides that a warrant shall not issue to search a dwelling, "Unless it is being used for the unlawful sale of intoxicating liquor," and does not specifically say that actual sales

on the premises must be proved. But clearly, in view of the obvious purpose of the section, this wording was intended not to broaden the rights of the Government, but to restrict them. The language "being used for the unlawful sale" would preclude a search warrant on proof of a single isolated sale, not showing a regular practice. It was evidently intended to confine searches of homes to cases of habitual selling, not to broaden the scope of the Act to include whatever is meant by "merchandising" as distinct from sales.

By the ordinary understanding of language, premises are used for the sale of liquor only when liquor is being sold on the premises. A place used for gambling is a place where gambling is actually conducted, and not where cards or gambling devices are manufactured or stored.

In the case at bar not only is there no evidence of a sale on the premises, but there is no evidence of a sale anywhere. This is tacitly admitted by the failure to include a sales count in the indictment (R. 1-2). To substitute evidence of manufacture coupled with an *opinion* of transportation for proof of sales is to defeat the whole purpose of Section 25. The National Prohibition Act leaves no opening for such a construction. It creates various offenses and then says that a warrant to search a residence shall be issued only for one of them, namely selling. It practically says that selling can not be inferred from proof of other offenses. If it could be Section 25 would be meaningless.

There is no doubt that Congress desired to reduce searches of homes to a minimum. As stated in *United States* v. *Berkeness*, 275 U. S. 147, 155:

> "But the emphatic declaration that no private dwelling shall be searched except under specified circumstances, discloses a general policy to protect the home against intrusion through the use of search warrants."

The policy is further emphasized by Section 6 of the Act of November 23, 1921, 42 Stat. 222, quoted above, which makes it a crime for any federal officer to search a private dwelling without a search warrant.

There is no way to enforce the exemption in Section 25, except to require as a basis for the search warrant evidence of sales on the premises.

That proof of actual sales must be made to authorize a warrant to search a private dwelling is squarely held in *Simmons* v. *United States*, 18 Fed. (2d) 85 (C. C. A. 8th C.). In that case the warrant for the search of a residence, recites, pages 88:

> "Proof by affidavit having this day been made before me by H. C. Coates that he believes intoxicating liquors are kept for the purpose of sale in the eight or nine room house on Sect. 22 Tp. 7 N. Range 12 East, in Okfuskee County, Oklahoma, owned by Ed. Holmer and occupied as a joint by Harris Simmons, said house being south and east of Paden on the right side of the road. That said affidavit shows that the place is a place where people congregate for the purpose of buying and selling intoxicating liquors, and is a place where people congregate seemingly sober and leave under the influence of intoxicating liquors."

The Court held the affidavit insufficient. The opinion (p. 88) says in part:

> "This warrant shows on its face that the proof upon which the said state judge based the finding of probable cause is the affidavit of Mr. Coates, and that such affidavit goes only to the extent of showing that Coates *believed* intoxicating liquors were kept for sale in a certain house. It does state that the affidavit shows the place is one where people congregated for the purpose of buying and selling intoxicating liquors and where people congregated sober and left under the influence of intoxicating liquor. This is based on affiant's belief,

> and there is nothing in the affidavit, as judged by the terms of the search warrant, to show actual sales or that Coates had any personal knowledge of sales."

On the same page (88) the Court says concerning the search of private dwellings:

> "The probable cause for the issuance of such warrant must be based on evidence of sales."

And at page 87 it says:

> "The search of the residence of a person is a serious matter, and the proceedings therefor must strictly conform with law, and not violate the Constitution of the United States."

The Maccieno Case

Maccieno v. *United States*, 270 U. S. 629, cited above, fully supports our contention that sales in a residence must be shown in order to justify a warrant for its search. It is true that there is no opinion in the case, but the facts, the petition for certiorari and the brief of the Solicitor General clearly disclose the questions necessarily decided. Aside from the attack on the warrant as not conforming to Section 6 of Title XI of the Espionage Act, the only point made by the petitioner was that the affidavits did not state facts. (Petition for certiorari p. 2.) The affidavit is set out on pages 3-4 of the petition for a writ of certiorari in that case and is referred to on page 5 of the brief of former Solicitor General Mitchell as being on page 24 of the record. The affidavit reads as follows:

> "Be It Remembered, That on this date, before me, the undersigned, a United States Commissioner for the Northern District of Ohio, Eastern Division, came J. G. Plappert, F. P. A., who being by me duly sworn, deposes and says that the laws of the United States, namely the National Prohibition Act, Oct. 28, 1919,

> Revised Statutes, are being violated by reason of the facts, to-wit: Affiant states that he has investigated the premises at 2570 E. 39th St., Cleveland, Ohio, and the rooms and places in and about the 2 story frame building, and all outbuildings located on the premises, and finds that all the same are used in part or solely for the unlawful possession and sale of liquor, to-wit, whisky, spirits, etc., containing 1.2 of 1% or more of alcohol by volume for beverage purposes. (A soft drink place and) connecting rooms are on the first floor of the main building, basement below and other rooms above, all of which are used in part or solely for the unlawful sale of said liquor. The premises are used and occupied by person or persons, whose name or names are unknown to affiant.
>
> ". . . . being premises of . . . . and being situated in the County of Cuyahoga and state of Ohio, and within the district above named."

This affidavit states no facts except that the affiant had investigated the premises involved. The brief of the former Solicitor General (p.5) expresses the opinion that no facts are set forth but conclusions only. On page 6, however, the brief comments on the oral testimony of the agent who made the affidavit, as follows:

> "The only investigation he had made was that he 'seen machines drive in on the premises,' and smelled the odor of mash, and 'seen men coming there and machines going away' and 'I was convinced there was something being sold there' (R. 13). He admits that he did not at any time see any actual sale of liquor made upon the premises; that the allegations in his affidavit were not based upon actual knowledge of sale, but were rather based 'upon a conclusion which I drew' (R. 14)."

This testimony was quoted for the evident purpose of showing that the conclusions in the affidavit were not even based on sufficient facts. In other words, if this testimony of the agent had been embodied in the affidavit, it would

not have been sufficient. The evidence that the witness saw machines drive to the premises, smelled the odor of mash and saw men going there and machines going away, did not show actual sales of liquor on the premises and was for that reason insufficient. Thus former Solicitor General Mitchell, in the language quoted from his brief, clearly discloses the opinion that proof of actual sales of liquor *on the premises* was necessary to justify a search of the residence. The judgment against Maccieno was reversed.

The inconsistent positions of the government in the search warrant and the indictment.

An anomalous situation necessarily results from treating such affidavits as sufficient to justify an inference of selling for *the purpose of search.* In the present case the evidence in the affidavit, even with the evidence secured by the search, was not considered sufficient to prove selling at the trial, because the indictment contains no sales count (R. 1-2). The official who drew the affidavit evidently realized that manufacture, possession, transportation and selling are different offenses under the Statute and the proof of one does not establish the commission of another. It was only for the purpose of circumventing Section 25, Title II, of the National Prohibition Act that this evidence was used to establish selling. If the evidence would not be sufficient at a trial it was not sufficient for the search warrant. The search of a private dwelling is not a trivial matter. It involves punishment of a degrading character, and is inflicted as the result of *ex parte* proceedings. Since the warrant can be lawfully issued only for one offense, the evidence on which it is based should be at least admissible at a trial on an indictment charging that particular offense. *Simmons* v. *United States,* 18 Fed. (2d) 85, supra; *Wagner* v. *United*

States, 8 Fed. (2d) 581, 583 (C. C. A. 8 C.). For that purpose proof of actual sale on the premises would be necessary.

In the *Maccieno* case the brief of the Solicitor General comments with disapproval on a similar situation. The brief (p. 7) says:

> "Though the only ground upon which a warrant may be issued to search a private dwelling is that liquor is sold there, it is to be noticed that the information contained no count charging the defendant with the sale of liquor, except such as is incidental to the nuisance count."

The case at bar and the *Maccieno* case are substantially alike. The affidavits in the two cases have exactly the same defect in that neither contains any proof of sales on the premises. That the affidavit in the present case states more facts than the affidavit in the Maccieno case is immaterial. These facts are not relevant. As said in *In Re Phoenix Cereal Beverage Co.*, 58 Fed. (2d) 953, 955: "Insufficient facts contained in the affidavits do not make a search warrant valid."

In *United States* v. *Deloic*, 2 Fed. (2d) 377 (W. D. Wash.) the affidavit for the warrant to search a residence stated that the affiant had "seen automobiles call at said premises and take from same packages which from their shape, contour and size resembled containers holding intoxicating liquors."

This statement was held insufficient to satisfy Section 25. The Court said at page 377:

> "Section 25, Title II, N. P. A. * * * specifically provides that a search warrant shall not issue for the search of a private dwelling unless liquor is *unlawfully sold therein*." (Italics ours.)

In *United States* v. *Palma*, 295 Fed. 149 (D. C. Mass.), the affidavit stated that the affiant had smelled the odor of distilling in the private residence described, and that liquor was manufactured there for commercial purposes. The Court after commenting on the fact that the affidavit contained too many conclusions, held that evidence of manufacture on a commercial scale was not enough to justify the search of a dwelling. The opinion says at page 152:

> "As has been frequently pointed out in cases arising under the Prohibition Act, the search warrant is the most drastic instrument which can be placed in the hands of an officer, and when legislation is enacted extending the right to search and seize in private dwellings, the Courts ought not to lend their sanction to any interpretation of this legislation which will extend the right beyond the clear and obvious intent thereof."

That proof even of an actual sale made away from the dwelling by a person living there is not sufficient under Section 25, is held in *Thompson* v. *United States*, 22 Fed. (2d) 134 (C. C. A. 4 C.). The evidence was that the witness had bought a gallon of whisky from the husband of the defendant, apparently not then on the premises involved, though he lived there. The Court held that the affidavit was defective because it showed no sales on the premises. The opinion at page 134 says:

> "Conceding the allegations of the affidavit, the search was nevertheless not justified, under the federal law, for the use of the premises for the sale of intoxicating liquor was not shown."

And on page 135 it says:

> "The record fails to show either that the warrant was supported by evidence indicating a *prior sale on the premises*, or that it was issued by a court of record." (Italics ours.)

In *Jozwich* v. *United States*, 288 Fed. 831 (C. C. A. 7 C.) the Court held that proof of manufacture was not a proper basis for a warrant to search a residence. At page 832 the opinion reads:

> "The manufacture of illicit liquor in a house does not bring the case within the language of the Statute
> * * *
> "It is apparent from a reading of this section that Congress had in mind the distinction which has always existed (so far as search is concerned) between a dwelling house and a place of business. Since the time of Otis, back in Colonial days, the dwelling house, occupied as such, has been recognized as the owner's 'castle' and has not been the legitimate object of raids by government officials, unless the showing made before the Commissioner disclosed added facts not necessary in case the alleged illegal transaction occurred in a place of business."

An effort to circumvent section 25 was defeated in *Singleton* v. *United States*, 290 Fed. 130 (C. C. A. 4 C.). In that case a federal agent had made an affidavit before a state magistrate in South Carolina on which a warrant was issued to a constable for the search of a residence. The affidavit did not charge sales, but was sufficient under the state law. The federal agent assisted the constable in the search. In holding the search unlawful the Court says at page 133:

> "The law of South Carolina permits the issue of a warrant to search a private dwelling for forbidden liquor *although there is no evidence that any sales have been made from that house.*" (Italics ours.)

This language clearly shows that the Court thought proof of sales *made from the house* was necessary under the federal statute. On the same page the opinion says:

> "A federal officer can not lawfully swear out a search warrant to search a private dwelling when he has not

> the evidence of illicit sale without which the Act of Congress has expressly declared no private residence may be searched; and being inhibited from doing this under the federal statute, he can not evade such statute by swearing out the same before state officers."

The Respondent in the brief in opposition to certiorari (p. 13) cites *Kasprowicz* v. *United States,* 20 Fed. (2d) 506, which no doubt supports its contentions. But this case, like *Maccieno* v. *United States,* 9 Fed. (2d) 61, was decided by the same Court from which the case at bar has come and indicates the same views. *United States* v. *Berger,* 22 Fed. (2d) 867 (D. C. Mass.) and *United States* v. *Vottiero,* 25 Fed. (2d) 346 (S. D. N. Y.) cited by the Respondent, are in line with the *Kasprowicz* case. These seem to be the only cases found sustaining the position of the Respondent.

That the actual thing required by the Statute must be done on the premises to constitute guilt is held in *Miller* v. *United States,* 300 Fed. 529 (C. C. A. 6 C.), where it was held the use of an office, as a headquarters for supervising a liquor business, did not, when the liquor was not present, make it a place where liquor was kept or sold within the nuisance section (para. 21) of the National Prohibition Act. And in *United States* v. *Lefkowitz,* 52 Sup. Ct. Rep. 420, decided April 11, 1932, the Court said at page 422:

> "The mere soliciting of orders from the room in connection with the other uses alleged in the complaint is not sufficient to constitute the maintenance of a nuisance therein."

Probable cause for one offense can not be supplied by proof of another offense.

The Respondent relies on the definition laid down in *Dumbra* v. *United States,* 268 U. S. 435, 441, to support the finding of probable cause in this case. But in the *Dumbra*

case the finding upheld was based on convincing evidence of definite facts stated in the affidavit. Remote conclusions were not involved. The decision might be authority for the finding here if *proof of manufacture* were sufficient to justify the warrant. Proof, and very slight proof, of manufacture is all the affidavit contains. Probable cause in this case is regulated by section 25 Title II. And that section excludes proof of manufacture as a basis for a warrant to search a dwelling. If selling can be *inferred* from proof of manufacture, then section 25 is meaningless. With equal plausibility selling might be inferred from possession in quantity.

Apparently it is not even contended that the *Dumbra* case is authority for a finding here that liquor was sold on the premises. For the brief of the Respondent says (pp. 12-13) that section 25, Title II, is satisfied by a showing of probable cause that the house is being used for the sale of liquor, *whether such sale is consummated there or elsewhere.* Even if proof of sales elsewhere would be sufficient it can not help the Respondent here, because there is no proof whatever of a sale anywhere.

Remote conclusions from the facts are not permissible under the rule of probable cause. In *Baumboy* v. *United States,* 24 Fed. (2d) 512 (C. C. A. 9 C.) it was held that evidence showing that drug addicts frequented the house of the defendant did not justify a warrant to search the premises for drugs. The Court said at page 513:

> "Addicts presumably must lodge somewhere, and that these persons went there for a legitimate purpose is fully as reasonable as a contrary assumption."

In *Veeder* v. *United States,* 252 Fed. 415 (C. C. A. 7 C.), Judge Baker said at page 418:

> "The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion or guess-work."

The narrow construction given to Section 25, Title II, reverses the principles of broad construction frequently laid down by the Supreme Court.

The decision of the Circuit Court of Appeals in the present case certainly restricts the exemption in Section 25 Title II of the National Prohibition Act within narrow limits. The restriction is made almost meaningless because by the decision of the Court below selling may be inferred from other offenses which are themselves excluded as grounds for searching homes. It is inconceivable that in adopting section 25 Congress meant so little. It sought to place dwellings in a class by themselves. In doing so it gave practical application to a doctrine that had been prevalent in America for a century and a half. Lord Coke's maxim that a man's house is his castle had been used by Otis in his argument against general writs of assistance in 1761, when he said:

> "Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet he is as well guarded as a prince in his castle."

In *Weeks* v. *United States,* 232 U. S. 283, the Court, after referring to writs of assistance, said at page 390:

> "Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house is his castle."

The narrow construction of the immunity applied by the Circuit Court of Appeals reverses the principles of broad construction repeatedly applied by this Court in cases involving the Bill of Rights. These cases have definitely established the rule that the provisions of the Bill of Rights are to be broadly construed and protected against gradual

encroachments that seek to deprive them of their effectiveness. And it is in relation to the Fourth Amendment that this principle has been most frequently and most emphatically laid down.

Boyd v. *United States,* 116 U. S. 616, applied the Fourth and Fifth Amendments in a case where no actual search was involved, because the situation involved the same results as an illegal search and a compulsory disclosure of incriminating evidence. The rule was laid down (p. 635) that constitutional provisions for the security of person and property should be liberally construed. And as an answer to the argument that the words in section 25 "being used for the unlawful sale of intoxicating liquor," do not mean sales on the premises, we call attention to the following language of Mr. Justice Bradley at page 635 of the *Boyd* case:

> "A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."

In *Gouled* v. *United States,* 255 U. S. 298, the Court says of the Fourth and Fifth Amendments at page 304:

> "It has repeatedly been decided that these amendments should receive a liberal construction so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of Courts or by well-intentioned but mistakenly overzealous executive officers."

In *Go-Bart* v. *United States,* 282 U. S. 344, the Court, in speaking of the Fourth Amendment, says at page 357:

> "The amendment is to be liberally construed, and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

And in *Byars* v. *United States,* 273 U. S. 28, the Court says at page 33:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and in the Colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right."

Other cases to the same effect are *Weeks* v. *United States,* 232 U. S. 383, *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, and *Amos* v. *United States,* 255 U. S. 313. It is cases like these that have made the Bill of Rights a living force in the United States.

CONCLUSION

The proceedings in the case at bar seem to involve the evils referred to in the cases last cited. They leave no force to section 6 of the Act of June 15, 1917. The construction that a general conclusion in the search warrant is a statement of the particular grounds or probable cause for its issual ignores the historical basis of the provision and deprives section 6 of the check intended on irregular searches. The ruling that selling or merchandising may be inferred from statements in an affidavit tending to show manufacture and stating a mere belief in transportation, may be classed as a "stealthy encroachment" on section 25 Title II of the National Prohibition Act. This encroachment practically destroys the section. The entire proceedings narrow the rights protected by the Fourth Amendment and by the Statutes enacted pursuant to it, and open the door to gross

abuse of the search warrant process. Both rulings are against the great weight of authority and are in conflict with *Maccieno* v. *United States,* 270 U. S. 629.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

CHARLTON B. THOMPSON,
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In the Supreme Court of the United States

OCTOBER TERM, 1931

WILLIAM GRAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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WILLIAM GRAU, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 29–32) is reported in 56 F. (2d) 779.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 11, 1932. (R. 29.) The petition for certiorari was filed April 21, 1932. The jurisdiction of this Court is revoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the search warrant, pursuant to which petitioner's dwelling was searched and liquor and property designed for its manufacture seized, was void, it being contended by the petitioner (1) that the warrant failed to state the particular grounds or probable cause for its issue, and (2) that the affidavits upon which it was issued were insufficient in that they failed to allege facts showing that intoxicating liquor had been sold on the premises to be searched.

STATUTES INVOLVED

Title XI of the Act of June 15, 1917, c. 30, 40 Stat. 217, 228 (U. S. C., Title 18, Secs. 613–616), commonly known as the Espionage Act, contains the following provisions:

> SEC. 3. A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.
>
> SEC. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.
>
> SEC. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

> SEC. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 39), provides in part:

> A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. * * * No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of Kentucky upon two counts, the first of which charged him with unlawfully manufacturing intoxicating liquor in an amount in excess of one gallon and not as a casual employee only, and the second with possessing property designed for the manufacture of intoxicating liquor intended for use in violation of the National Prohibition Act. (R. 1–2.) Before trial he filed a petition to quash a search warrant which had issued to search certain premises occupied by him as a dwelling, and to suppress all evidence obtained in the execution of the warrant, on the ground that the warrant was void because (1) it failed to state the particular grounds or probable cause for its issuance, as required by Section 6, Title XI, of the Act of June 15, 1917 (*supra*, p. 3), and because (2) the affidavits upon which the warrant issued failed to show that the premises sought to be searched were used for the unlawful sale of intoxicating liquor, as required by Section 25, Title II, of the National Prohibition Act (*supra*, p. 3). (R. 4–16.)

The petition to quash was overruled and an exception noted. (R. 4.) At the trial an objection was made to the introduction of the evidence secured on the search of the petitioner's dwelling on the ground that it had been illegally obtained, but this objection was overruled (R. 25), as was also a motion, on like ground, for a directed

verdict at the close of the Government's case (R. 26.) Exceptions were taken to these rulings.

At the trial the Government called as witnesses three Federal prohibition officers, who testified that they had searched the petitioner's home under authority of a search warrant and had found and seized one 200-gallon still, thirty-two 50-gallon fermenters, 1,600 gallons of still beer, 350 gallons of whisky, one 50-gallon copper whisky tank, 200 empty gallon cans, 12 gas burners, 2 electric motors, and 100 feet of rubber hose. (R. 25–26.) No testimony was offered by the defense. (R. 26.)

The jury returned a general verdict of guilty (R. 17), and petitioner was sentenced to imprisonment for five years (R. 20). The judgment was affirmed by the Circuit Court of Appeals. (R. 29.)

ARGUMENT

I

THE WARRANT SUFFICIENTLY STATED THE PARTICULAR GROUNDS OR PROBABLE CAUSE FOR ITS ISSUE

The warrant in question appears at pages 12–14 of the record. It describes particularly the "place to be searched" (R. 14) and the "things to be seized" (R. 13), and therefore meets the two requirements as to the contents of a search warrant specified in the Fourth Amendment. But the petitioner contends that the warrant is defective because it does not state the particular grounds or probable cause for its issue as provided in Section 6 of the Espionage Act (*supra*, p. 3), which is made applicable by Section 25, Title II, of the National

Prohibition Act (*supra,* p. 3). His principal argument is that a warrant does not comply with Section 6 unless it repeats the *facts* stated in the affidavit pursuant to which the warrant issues.

Preliminarily, it may be pointed out that, although Section 6 is couched in language imperative in form, so also are other provisions of the Espionage Act with respect to the issuance and execution of search warrants. But such provisions have almost uniformly been held to be merely directory and not mandatory. Thus, although Section 10 provides that—

> The judge or commissioner must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night,

it has been held that a failure to direct whether the warrant should be served in the daytime or nighttime did not invalidate the warrant where it appeared that the search was actually made in the daytime (*Johnson* v. *United States,* 46 F. (2d) 7, 9 (C. C. A. 9th)); and, where the affidavits were not positive that the property to be seized was in the place to be searched, a direction in the warrant to conduct the search at any time of the day or night was held not fatal to the validity of the warrant, it appearing that the search was in fact made in the daytime (*United States* v. *Callahan,* 17 F. (2d) 937,

940–941 (M. D. Pa.)). So, also, although Section 12 positively directs the officer seizing property under a search warrant to give a copy of the warrant to the person from whom the property is taken, his failure to do so has been held to constitute the mere omission of a ministerial duty which does not affect the validity of the search (*Johnson* v. *United States, supra* (p. 9); *United States* v. *Kaplan,* 286 Fed. 963, 971 (S. D. Ga.); *United States* v. *Gaitan,* 4 F. (2d) 848, 851 (S. D. Cal.); but see *Murby* v. *United States,* 293 Fed. 849 (C. C. A. 1st)); and the failure to make a verified return of the warrant, commanded by Section 13, has likewise been deemed insufficient to invalidate the search (*United States* v. *Kraus,* 270 Fed. 578, 582 (S. D. N. Y.); *Rose* v. *United States,* 274 Fed. 245, 250–251 (C. C. A. 6th); *Reisgo* v. *United States,* 285 Fed. 740, 741 (C. C. A. 5th); *United States* v. *Callahan, supra* (pp. 941–972); *Nordelli* v. *United States,* 24 F. (2d) 665, 666, 667 (C. C. A. 9th)).

The Espionage Act was undoubtedly enacted as a regulatory measure to bring about greater precision in the issuance and execution of search warrants, but it seems unlikely that Congress intended by that Act to invalidate a search made pursuant to a warrant, valid under the Fourth Amendment, unless there is some showing that the person whose premises have been searched and property seized has been prejudiced by the failure to comply with the statute. The warrant here involved informed the petitioner that affidavits had been filed with the

commissioner alleging that "intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold" upon the premises, and that upon examination of the complaining witnesses under oath the commissioner had found that probable cause had been shown that the property was being used for the "unlawful manufacture, possession and sale of intoxicating liquor." No attempt was made by the petitioner to show that he was in any way prejudiced by the failure of the warrant to state all the facts set forth in the affidavits. The affidavits were on file with the commissioner and doubtless were open to petitioner's inspection.

But assuming that the language of Section 6 is mandatory, we submit that it was complied with. Section 5 of the statute (*supra,* p. 2), with which Section 6 is in *pari materia,* provides that "the affidavits or depositions must set forth the *facts* tending to establish the *grounds* of the application or probable cause for believing that they exist." (Italics ours.) Obviously the "grounds" and the "facts" are not, as petitioner contends, synonymous. The "particular grounds" referred to in Section 6 are clearly those referred to in Section 5 as the grounds which the *facts* must tend to establish. Accordingly the words "particular grounds" in Section 6 would seem to comprehend merely a statement of the offenses which it is charged are being committed on the premises. If the warrant

states these offenses, or that there is probable cause for believing that they are being committed, it states, we submit, the "particular grounds or probable cause for its issue," as required by Section 6.

The purpose of the statutory requirement was to inform the person whose premises are to be searched of the mission of the searching party. While the warrant in the instant case is loosely phrased, it adequately informed the petitioner of the charge that his dwelling house was being used for the unlawful sale of intoxicating liquor—a permissible ground for search under Section 25, Title II, of the National Prohibition Act. (*Supra*, p. 3.)

Petitioner cites *Giles* v. *United States*, 284 Fed. 208 (C. C. A. 1st) as in conflict with the decision of the court below. (Br. p. 23.) While the court there stated that a recital in a warrant substantially similar to that involved in the instant case did not comply with the requirements of Section 6, the case cited loses some of its weight as an authority opposed to the case at bar by reason of the fact that the warrant there involved was also declared to be defective in a number of other respects. Whether the court would have regarded the defect in question as fatal if it had been the only one involved is, of course, a matter of surmise. But assuming that the cases are in conflict, we do not believe that the conflict is one which requires the exercise by this Court of its supervisory power of review. The only

effect of the *Giles* decision is to require officers issuing warrants in the First Circuit to make a fuller statement than the statute calls for. This is not a serious administrative burden on such officers. The *Giles* case was decided ten years ago, and it will be time enough to review the question if in the future the Circuit Court of Appeals for the First Circuit should hold invalid a warrant meeting the requirement of the statute.

Petitioner also cites *Maccieno* v. *United States,* 270 U. S. 629. In that case this Court granted certiorari and reversed the judgment below upon confession of error by the Government. But it appears from the memorandum filed on behalf of the Government in that case (pp. 3–4) that, so far as the warrant in controversy was concerned, the Government's confession of error was based upon the ground that "there is no description of the property to be seized; in fact, there is no direction to seize any property, merely to investigate and search into and concerning certain violations of law." The case is, therefore, not in point.

II

THE AFFIDAVITS ESTABLISHED PROBABLE CAUSE FOR BELIEVING THAT PETITIONER'S DWELLING WAS "BEING USED FOR THE UNLAWFUL SALE OF INTOXICATING LIQUOR."

Section 25, Title II, of the National Prohibition Act provides that "No search warrant shall issue to search any private dwelling occupied as such

unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose," etc. Since concededly the premises in question were a dwelling house and since, so far as the facts alleged in the affidavits are concerned, it is not asserted that the premises were used in part for business purposes, the question presented is whether the affidavits upon which the warrant was based showed probable cause for believing that the premises were "being used for the unlawful sale of intoxicating liquor."

The affidavit of Agent Curtis [1] contained the following recitals (R. 15):

> Now comes F. M. Curtis, P. A., and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.

---

[1] Two affidavits were presented to the Commissioner who issued the warrant. One of them, that by Agent Sandlin, may be disregarded, as it refers to the affidavit of Agent Curtis for the facts supporting the charges that the premises were used for the unlawful possession, manufacture, and sale of intoxicating liquor.

Petitioner contends that this affidavit is insufficient because it does not show any actual sales of liquor upon the premises. (Br. 26.)

Inherent in this contention are two untenable assumptions. The first is that the warrant may not issue until sale has been actually proved. This ignores completely the correct concept of probable cause. As this Court said in *Dumbra* v. *United States,* 268 U. S. 435, 441:

> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.

The second erroneous assumption is that Section 25, Title II, of the National Prohibition Act requires a showing of probable cause that liquor is being *sold on the premises.* But the Act merely says that the warrant shall not issue unless the dwelling "is being used for the unlawful sale of intoxicating liquor." This provision is satisfied, we believe, by a showing of probable cause for belief that the dwelling is being used for the purpose of

effecting the sale of liquor, *whether such sale is consummated there or elsewhere.* Such a construction of the statute meets the mandate of Section 3 of Title II that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," and finds support not only in the decisions of the court below in the instant case and in *Kasprowicz* v. *United States,* 20 F. (2d) 506 (C. C. A. 6th), but also in *United States* v. *Berger,* 22 F. (2d) 867 (D. Mass.), and *United States* v. *Vottiero,* 25 F. (2d) 346, 347 (S. D. N. Y.). In the *Berger* case the court said (p. 867):

> The language of the statute, "used for unlawful sale," might upon a strict construction be held to refer only to sales completed in the dwelling. But the expression has also a wider signification and may mean "used in the business of selling liquor unlawfully," as the basement of a shop may be said to be used for selling goods, though no contracts of sale are made there. This interpretation of the statute gives to its expression "for the sale" a meaning equivalent to "in connection with the sale." * * *
>
> Taken as a whole, the act shows a clear and firm intent that the homes of people who are not commercializing liquor shall not be invaded by search warrants, and per contra an equally clear intent that where commercialism is present search warrants may be used to suppress the illegal business. In

> *Kasprowicz* v. *U. S.*, 20 F. (2d) 506 (C. C. A. 6th), evidence that several automobiles were observed over a period of several days taking away from a dwelling house what appeared to be intoxicating liquor, was held to justify the issue of a search warrant for it, on the ground "that the dwelling was being used for 'the purpose of sale.'" Denison, J., at page 507. Considering the general intent of the act and its provisions for liberal construction above quoted, I think that the expression "used 'for unlawful sale of intoxicating liquor'" should be interpreted as meaning used in the business of selling liquor unlawfully.
>
> It follows that a dwelling used to manufacture liquor, which is either sold there or taken thence for sale, is subject to search under the act.

The affidavit in this case (*supra*, p. 11) is admittedly not a well-drawn document. It is doubtful if the facts therein recited were sufficient to show probable cause that liquor was being sold upon the premises. (Cf., however, *United States* v. *Lepper*, 288 Fed. 136, 138–139, affirmed in open court *sub nom. Lepper* v. *United States*, 295 Fed. 1017 (C. C. A. 2d).) But we submit that under the test established in the *Dumbra* case, *supra*, the affidavit was entirely adequate to establish probable cause for believing that the dwelling house was being used as a headquarters for the merchandising of liquor. As the court below said (R. 31):

> One does not manufacture liquor for his own use in such quantities as to require wholesale deliveries of corn sugar or the other ingredients of mash; and whiskey so manufactured for personal use is not ordinarily shipped from the premises in cans, by automobile or truckload; nor are the cans in such case subsequently returned for refilling. * * *

This showing, we contend, was a sufficient compliance with Section 25.

There is nothing in *Simmons* v. *United States,* 18 F. (2d) 85 (C. C. A. 8th), cited by petitioner, which militates against our position. There the affidavit purported to allege the sale of liquor on the premises sought to be searched. The court held that the affidavit was not sufficient because it did not state facts within the personal knowledge of the affiant but rested rather upon mere beliefs and suspicions. While there is language in the opinion which conceivably may be interpreted as requiring that the affidavit must show either actual sales or that the affiant had personal knowledge of such sales, the idea which the court undoubtedly meant to convey was that an affidavit, where it purports to charge sale upon the premises, must show either actual sales thereon or state such facts within the personal knowledge of the affiant as would lead a reasonable and prudent man to believe that liquor was being there sold. We do not believe that a conflict can be predicated upon the *Simmons* decision.

The petitioner also cites the *Maccieno* case, *supra,* as to the sufficiency of the affidavit. The affidavit there involved simply stated that the agent had investigated the premises in question and found "that all of the same are used in part or solely for the unlawful possession and sale of liquor." The Government confessed that this affidavit was inadequate because (memorandum, p. 5) "No facts whatever are set forth, merely the bald conclusion of the prohibition officer * * *." This is obviously not the situation in the instant case. The comments of the Solicitor General in the Government's memorandum in the *Maccieno* case, quoted at the bottom of page 31 of the petitioner's brief, with reference to the testimony of the agent, were contained in a paragraph the object of which was expressed in its first sentence, "Besides being defective, the affidavit was untrue." The paragraph then proceeds to show in what respects the affidavit was untrue, and concludes with the statement quoted by the petitioner. It seems clear that the mind of the Solicitor General was not at that moment directed to what it is necessary to show as a prerequisite to the issuance of a warrant.

CONCLUSION

We believe that the case was correctly decided. There is no such conflict of decisions as would warrant this Court in exercising its supervisory power of review at this time. The petition should be denied.

Respectfully submitted.

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MAY, 1932.

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No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1932

WILLIAM GRAU, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 39), provides that—

> No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding house.

It is not denied that the premises searched were occupied solely as a private dwelling. (R. 22–23, 24.) The affidavit [1] upon which the search warrant was based reads as follows (R. 14):

---

[1] Two affidavits were presented to the Commissioner who issued the warrant. One of them, that by Agent Sandlin, may be disregarded, as it refers to the affidavit of Agent

> Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Loraine Court (Woodlawn), Newport, Campbell County, Ky.

One of the questions presented is whether this affidavit showed probable cause for believing that the premises were being used in the manner specified in Section 25.

In our brief in opposition to the petition for certiorari we doubted the sufficiency of the affidavit to show probable cause for belief that liquor was being sold upon the premises, but contended that if the premises were being used in conducting the business of selling liquor, it was immaterial whether sales were consummated on the premises or elsewhere. The court below having considered (R. 27) the affidavit adequate to establish probable cause for believing that the dwelling in question was being used as a "headquarters for the merchandising of liquor," we opposed the writ. We

---

Curtis for the facts supporting the charges that the premises were used for the unlawful possession, manufacture, and sale of intoxicating liquor.

are still of the opinion that a warrant may lawfully issue to search a dwelling house thus used. *Kasprowicz* v. *United States,* 20 F. (2d) 506 (C. C. A. 6th); *United States* v. *Berger,* 22 F. (2d) 867 (Mass.); *United States* v. *Vottiero,* 25 F. (2d) 346, 347 (S. D. N. Y.); *United States* v. *Backer,* 32 F. (2d) 936 (N. D. Cal.), but see cases cited *contra* (Pet's. Brief, pp. 34–37). The difficulty we experience is that upon further consideration we are unable to escape the conclusion that the allegations of the affidavit in question are not sufficiently comprehensive to support a showing that the premises were used in connection with the sale of liquor anywhere. *Nobriga* v. *United States,* 22 F. (2d) 507 (C. C. A. 1st); *United States* v. *Deloic,* 2 F. (2d) 377 (W. D. Wash.); *Cf. In re Herter,* 33 F. (2d) 402 (C. C. A. 9th); *Hurley* v. *United States,* 300 Fed. 75 (C. C. A. 1st); *United States* v. *Lepper,* 288 Fed. 136 (W. D. N. Y.), affirmed without opinion *sub. nom. Lepper* v. *United States,* 295 Fed. 1017 (C. C. A. 2d); *United States* v. *Backer,* 32 F. (2d) 936 (N. D. Cal.), *supra.* The agent was not unaware that the place to be searched was a private dwelling, and his affidavit should have set forth the evidence of commercialism in clear, precise, and unequivocal language. His affidavit shows only that cans were brought to a place where there was some reason to believe that liquor was being manufactured and that these cans were later taken away again in the car which brought them.

There was no evidence of sale on the premises or at any other place.

The affidavit did not show that the dwelling house was being used for any business purpose. For this purpose, it was not enough to show illegal manufacture. *Staker* v. *United States,* 5 F. (2d) 312 (C. C. A. 6th); *Jozwich* v. *United States,* 288 Fed. 831 (C. C. A. 7th); *United States* v. *Leach,* 24 F. (2d) 965 (Del.); *United States* v. *A Certain Distillery,* 24 F. (2d) 557 (E. D. La.); *United States* v. *Jajeswiec,* 285 Fed. 789 (Mass.). There was nothing to show continuity of operations or any other circumstances from which it could fairly be assumed that liquor was being manufactured for commercial purposes. See *Nobriga* v. *United States,* 22 F. (2d) 507 (C. C. A. 1st), *supra; United States* v. *Goodwin,* 1 F. (2d) 36 (S. D. Cal.).

In view of our conclusion it is unnecessary to discuss at length the other contention urged by petitioner, i. e., that the warrant was defective because it did not repeat the facts set forth in the affidavit. The analysis we have made of Section 6 of the Espionage Act and its related sections in the brief in opposition challenges this contention, which we believe to be without merit. (Br. pp. 5–10.) We are sustained in this position by the legislative history of those sections, which shows that they were intended to have the same effect as corresponding provisions of the New York Code of

Criminal Procedure. (See House Report No. 69, 65th Cong., 1st Sess., p. 20; Cong. Rec., Vol. 55, p. 3439.) Section 797 of the New York Code (Cook's Criminal Code, 29th ed., 1917, pt. 2, p. 467) prescribes a form of warrant which complies with the statute and which reads as follows:

> Proof by affidavit having been this day made before me, by [naming every person whose affidavit has been taken], that [stating the *particular grounds of the application, according to section seven hundred and ninety-two,* or if the affidavit be not "positive that there is probable cause for believing that," stating the ground of the application in the same manner]. (Italics ours.)

Section 792 of the Code (id., p. 466), to which the form makes reference, is substantially like Section 2 of the Espionage Act (40 Stat. 228; U. S. C., Title 18, Sec. 612) and states the particular grounds upon which a search warrant will issue, i. e., when the property was stolen or embezzled; when it was used as the means of committing a felony, etc. It is evident, therefore, that the warrant is not invalid merely because it states the grounds of the application, without reciting the facts disclosed by affidavit or oral testimony upon which the warrant issued.

CONCLUSION

We are constrained to conclude that the affidavit was insufficient to support the warrant but do not formally confess error, believing that where con-

viction for crime has been affirmed in a Circuit Court of Appeals the judgment of conviction should not be reversed except by this Court after examination of the record.

Respectfully submitted.

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SEPTEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

No. 43.—October Term, 1932.

William Grau, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 7, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner was convicted under an indictment in two counts, the first charging the unlawful manufacture of whisky, and the second possession of property designed for the unlawful manufacture of intoxicating liquors.[1] He complains that certain articles offered at the trial were obtained by virtue of a void search warrant and that the trial court erred in overruling a motion to quash the process and to suppress the evidence, and in admitting it at the trial. The Circuit Court of Appeals overruled errors assigned to the District Court's action and affirmed the judgment.[2]

The assertion is that the warrant is void for failure to observe the statutory requirement that it state the "particular grounds or probable cause" for issuance; and for the further reason that it is based on affidavits which do not "set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist".[3] We need not consider the alleged defect of the warrant, as we think the objection to the affidavits well taken, and the warrant consequently without lawful foundation.

[1] These counts were based on U. S. Code, Tit. 27, §§ 12 and 39.

[2] 56 F. (2d) 779. Certiorari was granted to resolve a conflict of decision with other Circuits. Cf. *Giles* v. *United States*, 284 Fed. 208 (C. C. A. 1); *Simmons* v. *United States*, 18 F. (2d) 85 (C. C. A. 8).

[3] Section 25 of Title II of the National Prohibition Act (U. S. C., Tit. 27, § 39) authorizes the issuance of a search warrant in accordance with the terms of the Act of June 15, 1917 (U. S. C., Tit. 18, Secs. 613-616). The matter quoted as to affidavits is contained in Section 615, and that concerning warrants in Section 616.

Two affidavits were made before the commissioner. One purported to state the facts; the other merely asserted a belief that the statements in the first were true, and is clearly insufficient. *Byars* v. *United States,* 273 U. S. 28.

So far as material, the more detailed affidavit states that "on or about October 14, 1931, he (affiant) went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whisky, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whisky mash on the premises."

Pursuant to the process issued officers seized a still, its appurtenances, and 350 gallons of whisky, and these were offered and admitted in evidence at the trial.

Section 25 of Title II of the National Prohibition Act[4] provides: "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the *unlawful sale* of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."

The affidavit fails to state the place to be searched is not a private dwelling, and the record affirmatively shows it was. At most the deposition charges the manufacture of whisky; no averment of sale is made; indeed no facts are given from which sale, on or off the premises described, necessarily is to be inferred. The court below, however, held that the facts set forth warranted a belief that the dwelling was being used as headquarters for the merchandising of liquor. This was deemed a sufficient compliance with the statutory permission for search of a dwelling if "used for the unlawful sale of intoxicating liquor".

The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the Fourth Amendment, in consonance with which the statute was passed. Those guaranties are to be liberally construed to prevent impairment of the protection extended. *Boyd* v. *United States,* 116 U. S. 616, 635; *Gouled* v. *United States,* 255 U. S. 298, 304; *Go-Bart Co.* v. *United States,* 282 U. S. 344, 357. Congress intended, in adopting section 25 of

[4] U. S. C., Tit. 27, § 39.

Title II of the National Prohibition Act, to preserve, not to encroach upon, the citizen's right to be immune from unreasonable searches and seizures, and we should so construe the legislation as to effect that purpose.

A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles* v. *United States,* 284 Fed. 208; *Wagner* v. *United States,* 8 F. (2d) 581); and would lead a man of prudence and caution to believe that the offense has been committed. *Steele* v. *United States,* 267 U. S. 498, 504. Tested by these standards the affidavit was insufficient. While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made.

The process should have been quashed, and the articles seized delivered to the petitioner. Their admission as evidence was error, and the judgment must be reversed.

Reversed.

Mr. Justice STONE and Mr. Justice CARDOZO are of opinion that the judgment should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.